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In The

Supreme Court of the United States

October Term, 1991

CHEZ SEZ III CORP., a corporation of the State of New Jersey, and JACK CHESNER,

Petitioners,

vs.

TOWNSHIP OF UNION, a political subdivision of the State of New Jersey, and SALVATORE J. MAURO, Construction Official of the Township of Union, in his official capacity,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the unreviewed administrative interpretation of an ambiguous provision of a municipality's zoning ordinance by the municipality's Zoning Board of Adjustment is sufficient to "settle" an issue of state law for *Pullman* abstention purposes where the Zoning Board of Adjustment has been specifically delegated responsibility for giving authoritative interpretations of local zoning ordinances by the New Jersey Legislature. That is, whether, in these circumstances, an administrative interpretation of a facially ambiguous ordinance will remove the ambiguity for *Pullman* purposes.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Chez Sez III Corp. and Jack Chesner, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in

the above-entitled case on September 24, 1991.

OPINIONS BELOW

The September 24, 1991 opinion of the court of appeals, whose judgment is here sought to be reviewed, is reported at 945 F.2d 628 (3rd Cir. 1991) and is reprinted in the Appendix to this Petition at page 1a. The prior opinion of the United States District Court for the District of New Jersey is unreported. The district court's oral opinion of October 17, 1990, is reprinted in the Appendix at page 19a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 24, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND ORDINANCES INVOLVED

This case involves provisions of New Jersey's Municipal Land Use Law and of a Land Development Ordinance promulgated according to its authority.

N.J.S.A. 40:55D-69 provides, in pertinent part:

> Upon the adoption of a zoning ordinance, the governing body shall create, by ordinance, a zoning board of adjustment. . . .

N.J.S.A. 40:55D-70 provides, in pertinent part:

> The board of adjustment shall have the power to:
> . . .

> b. Hear and decide requests for interpretation of the zoning map or ordinance. . . .

Township of Union Land Development Ordinance § 200 Definitions provides, in pertinent part:

> *SHOP, RETAIL* A building or part thereof in which or from which a service is rendered directly to the ultimate consumer. . . .
>
> *STORE, RETAIL* A building or part thereof in which or from which merchandise is sold directly to the ultimate consumer.
>
> Any word or term not defined herein shall be used with the meaning of standard usage. . . .

Township of Union Land Development Ordinance § 605 provides, in pertinent part:

> The schedule entitled, "Schedule of Limitations, Land Development Ordinance, Township of Union, Union County, New Jersey," is hereby made a part of this ordinance.
>
> 605 SCHEDULE OF LIMITATIONS, LAND DEVELOPMENT ORDINANCE, TOWNSHIP OF UNION, UNION COUNTY, NEW JERSEY . . . BB & BC BUSINESS
>
> 2. Stores & Shops for Retail Sales of Goods & Services . . . .
>
> 5. Motion Picture Theaters . . . .

Township of Union Land Development Ordinance § 613.I. provides, in pertinent part:

> Prohibited Uses. All uses not expressly permitted by this Ordinance are prohibited . . . .

STATEMENT OF THE CASE

A. Nature of the Action and Jurisdiction

Chez Sez III Corp. and Jack Chesner, its shareholder, have brought this action pursuant to 42 U.S.C. § 1983, to obtain a determination with respect to the constitutional validity of certain provisions of the Township of Union Land Development Ordinance as they have been interpreted by its Zoning Board of Adjustment and applied to them, and for related relief. Jurisdiction in the trial court was founded on 28 U.S.C. § 1343(a)(3) and (4). Jurisdiction in the circuit court was founded on 28 U.S.C. § 1292(a)(1) and upon *Biegenwald v. Fauver,* 882 F.2d 748 (3rd Cir. 1989).

B. The Video Viewing Booth Dispute

For some time since before 1985, the property now occupied by Chez Sez in Union Township, New Jersey, has been located in a business zone as defined by the Township's Land Development Ordinance. According to that same ordinance, stores and shops for retail sales of goods for the rendition of retail services are uses specifically permitted in a business zone. For retail uses, the ordinance requires one off-street parking space for each 200 square feet of gross floor area. Because of the size and configuration of the property and the size and location of the building on it, it is impossible to provide parking spaces which comply in number, dimension and configuration as required by the ordinance. However, the improvements on the property have existed and have

been used continuously for retail uses since before the effective date of the ordinance provisions regarding required numbers and configuration of off-street parking. Accordingly, the use of the property for retail sales and services is allowed, notwithstanding its nonconformity with respect to requirements for off-street parking.

Chez Sez leased the property from its owner for a term beginning on February 2, 1986. At the time it entered into that lease, it intended to utilize some or all of the space for the retail sale and rental of video cassettes, video playback and video recording equipment and to offer, in addition, brief, individual viewings of video presentations in coin-operated, free-standing, booth-type facilities. It also intended to sell books, magazines and novelties.

After making some modifications to the interior and receiving a Certificate of Occupancy from the Township's Construction Official, Salvatore J. Mauro, Chez Sez assembled a total of eleven (11) pre-fabricated booths in a room on the first floor of its leased premises, equipped them (or most of them) with coin-operated television monitors, and, on about September 1, 1986, commenced to do business. The videos able to be viewed in the booths were the same as those offered for sale or rental.

Shortly, a dispute arose between the Township — specifically Mr. Mauro and Chez Sez. The Township took the position that the use of a portion of the premises for the exhibition of videos in booths constituted that portion of the premises as something other than a retail sales or service use requiring a separate application for a Certificate of Occupancy. Chez Sez's position was that the exhibition of videos in its booths was simply a specie of a retail service according to the expansive definition of "retail shop" found in the Land Development Ordinance. Ultimately, Chez Sez made application under protest for a Certificate of

Occupancy for the use of a portion of its premises for the exhibition of videos in its booth-type facilities. Mauro denied the application, giving as his reason that the use constitutes ". . . a change of use due to booth-type facility from retail sales to place of amusement with insufficient parking . . . ." ("Place of amusement" is not a use defined or mentioned in the Township's Land Development Ordinance.)

Chez Sez filed an appeal from Mauro's determination with the Township's Zoning Board of Adjustment, as well as an application for an interpretation of certain provisions of the Township's Land Development Ordinance. The appeal and application for interpretation were filed with the Board of Adjustment according to the authority of N.J.S.A. 40:55D-70(a) and (b). On August 1, 1990, Chez Sez appeared with counsel to prosecute its appeal and application for an interpretation. Following the introduction of Chesner's sworn testimony and the proffer of several documents in evidence, and after hearing argument by Chez Sez' counsel, counsel for the Board advised as follows:

> . . . [W]hile the sale, service and rental of tapes and equipment does meet the criteria of a retail sales service use in our judgment, the addition of video booths renders the use violative of the Township's Zoning Ordinance.
>
> First, the video booth "use", which is distinct from the store sales, rental and service functions, does not fall within any use category set forth in the Code as permitted within the Business C Zone in which the subject use is located.
>
> In this regard, any use not expressly permitted by our ordinance is prohibited, and I refer you to section 613-I.

Upon the conclusion of the proceedings, the Board unanimously approved a motion in which it adopted the interpretation of its counsel.

At the next regular meeting of the Board — on September 5, 1990 — it unanimously approved a formal resolution in which it adopted the interpretation of its counsel. On September 17, 1990, Mauro subscribed to an order addressed to the Chief of Police mandating action to require the use and operation of the video booths on Chez Sez' premises to cease and desist. Without notice to Chez Sez, later that day, Mauro and several members of the Township's police force visited Chez Sez' premises. They removed several patrons from the booths and constructed a plywood wall at the entrance of the video-viewing room to prevent the further use of the booths. From and after that date, Chez Sez has discontinued the use of that portion of its premises in the booths themselves.

C. The Rulings Below

Chez Sez and Chesner filed a complaint in the District Court of New Jersey on September 28, 1990, seeking to have the court declare the Board's interpretation of the Land Development Ordinance and its application to Chez Sez unconstitutional and seeking related relief. The district court determined, *sua sponte* and without benefit of briefs or argument, to abstain. It found that a prohibition against all showing of video films in private booths in any part of the Township would, indeed, be unconstitutional and a violation of Chez Sez' First Amendment rights. As the circuit court noted:

> . . . the district court also concluded the Board's interpretation of the [Land Development] Ordinance lacked rationality. It predicted that a New Jersey court would most likely interpret the

> [Land Development] Ordinance to find that video booths are a "theater use" under the Ordinance. Although theaters are not permitted on this particular property, because it is not large enough to include the requisite number of off-street parking spaces for theater uses, the video booths would, if classified as a theater use, be permitted elsewhere in the Township. The district court thus concluded that Chez Sez's First Amendment claim would be eliminated if the booths were found to be a "theater use" under the Ordinance.
>
> Since the district court found that the [Land Development] Ordinance was amenable to a construction by the state courts which would obviate the need for federal adjudication of a constitutional issue, it decided to abstain pursuant to the doctrine articulated in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), in order to allow the state court to rule in the first instance upon the proper interpretation of the [Land Development] Ordinance.

Appendix at page 5a-6a. Accordingly, Chez Sez' action was administratively dismissed.[1]

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1. The district court's conclusion that the Board's interpretation lacked rationality because of its prediction that a New Jersey court would most likely interpret the Land Development Ordinance to find that the video booths are a theater use does not square with applicable New Jersey law. The precise issue was considered in *East Wind Realty, Ltd. v. Board of Adjustment of Township of Wall*, 218 N.J. Super. 412, 416 (App. Div. 1987), where the court said:

> Although no definition of indoor theater is provided in the

Chez Sez appealed to the court of appeals. Noting that three special circumstances are generally prerequisite to the application of the *Pullman* abstention doctrine, Chez Sez urged that all three were absent. With specific reference to the first of the three, Chez Sez urged that there are no uncertain issues of state law underlying the federal constitutional claim brought in federal court as the interpretation of the Township's Land Development Ordinance by its Board of Adjustment is an authoritative construction.

The circuit court agreed, though, with the district court, that all three of the "special circumstances" were present and that the case thus fell within the general ambit of *Pullman*. The circuit court found, and Chez Sez agrees, that the language of the ordinance is ambiguous on its face. The circuit court acknowledged that if an otherwise ambiguous statute has been authoritatively construed by the state *courts*, abstention would not be appropriate. It held, though, that notwithstanding the definitive interpretation by the Board of Adjustment, an administrative interpretation of a facially ambiguous statute will not remove the ambiguity for *Pullman* purposes. The circuit court concluded, therefore, that the first requisite for consideration of *Pullman* abstention was present — an unsettled issue of state law.

REASONS FOR GRANTING THE WRIT

The circuit court, in finding that the three *Pullman* "special circumstances" existed in this case, said:

> If an otherwise ambiguous statute has been authoritatively construed by the state courts,

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(Cont'd)

> ordinance, a coin-operated movie machine is not, by any reasonable construction of the ordinance, an indoor theater for the audience's viewing.

> abstention would not be appropriate. [citation omitted] The sections of the Union Township [Land Development] Ordinance here at issue have never been interpreted by the New Jersey courts. Although the Board of Adjustment has made a definitive ruling interpreting these sections of the Ordinance, "an administrative interpretation of a facially ambiguous statute will not remove the ambiguity for *Pullman* purposes." [citation omitted] We therefore conclude that the [Land Development] Ordinance presents unsettled issues of state law, and that the first of the three *Pullman* factors has thus been met.

Appendix at page 10a-11a.

While no court has yet held that an administrative interpretation may "settle" an issue of state law for *Pullman* purposes, the determination of the circuit court is inconsistent with the decisions of this Court which has, increasingly, treated administrative determinations, in proper circumstances, as equivalent to determinations made in the course of judicial proceedings. A determination by this Court that an administrative interpretation of an ambiguous law will, in appropriate circumstances, settle state law for *Pullman* purposes, "will have importance far beyond the particular facts and parties involved here." *See, e.g., Address of Chief Justice Vincent before American Bar Association*, September 7, 1949, 69 S. Ct. v, vi; *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452-454 (1959) (Frankfurter, J., dissenting). The question decided by the circuit court was decided in a way in conflict with the principles established by applicable decisions of this Court and is an important question of federal law which has not been, but should be, settled by this court. Supreme Court Rule 10 1.(c). *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-624 (1975) (certiorari granted on claimed

"conflict in principle" and "because of the importance of the issue").

At one time, federal courts looked to the state's highest court for determinative interpretations of state law. *See Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) (in absence of ruling from state's highest court, federal court may, in exercise of its pendent jurisdiction, ignore decision of a state administrative agency and make its own ruling on proper interpretation of a state statute). Subsequently, in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court mandated that a federal court look further than a state's highest court for guidance as to the proper construction of a state statute. Within ten (10) years of the decision in *Erie*, it became clear that even the interpretation of a trial court of a provision of state law is binding on a federal court. *See Terminiello v. Chicago*, 337 U.S. 1 (1948) (construction placed upon city ordinance in state court's instructions to jury in prosecution for its violation is a ruling on state law that is binding on the Supreme Court of the United States as though the precise words had been written in the ordinance itself).

The interpretation which this Court considered binding in *Terminiello* was that of a court of limited jurisdiction — a municipal court of the City of Chicago. The municipal court's jury instructions had been reviewed and approved by an Illinois appellate court. However, this Court has made plain that review by an appellate court of a trial court's interpretation of state law is unnecessary for that interpretation to be binding on federal courts. In *Houston v. Hill*, 482 U.S. 451 (1987), this Court reviewed the constitutionality of a municipal ordinance making it unlawful to interrupt police officers in the performance of their duties. The City urged that *Pullman* abstention was appropriate, as there were limiting constructions readily available to the state courts that would eliminate the ordinance's claimed overbreadth. In ruling on the City's contention that the state courts had not

had an opportunity to construe the ordinance, this Court first noted that it did not consider the ordinance ambiguous. The Court added that, in any event, only the state *appellate courts* appeared to have lacked an opportunity to construe the ordinance and

> It is undisputed that Houston's Municipal Courts, which have been courts of record in Texas since 1976, have had numerous opportunities to narrow the scope of the ordinance. [footnote omitted] There is no evidence that they have done so. [footnote omitted] In fact, the city's primary position throughout this litigation has been "to insis[t] on the validity of the ordinance as literally read." [citation omitted] . . . .

Houston v. Hill, 482 U.S. 451, 469-70 (1987).

It seems a very short step from the acceptance of the unreviewed interpretation of a municipal ordinance by a municipal court to the acceptance of the unreviewed interpretation of an ordinance or regulation by an administrative body, in proper circumstances, charged with enforcing the ordinance or regulation in question. That an administrative interpretation should be accepted as settling an ambiguous ordinance or regulatory provision seems all the more logical when one considers the development of the law concerning judicial review of agency interpretations.

Before the evolution of administrative agencies, the interpretation of a statute was considered to present a question of law, and it was exclusively and ". . . emphatically the . . . duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[2] Much has

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2. And *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

happened since 1803. Administrative agencies have been created and the importance of their roles has grown steadily. Because, of course, they were created to administer statutory schemes, they must regularly interpret provisions of those statutes, as well as regulations promulgated according to the authority of those statutes. Agency interpretations of statutes and their own regulations are frequently subject to judicial review. While, originally, the standard for review may have been plenary, the judiciary has shown greater and greater deference to agency interpretations. For example, this Court, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), held that the views of the Administrator of the United States Department of Labor's Wage and Hour Division were deemed to provide guidance to the courts and to have power to persuade. While the Administrator's construction of a statute was not to have controlling effect on the courts, neither did the courts write on the clean slate that would exist without the prior construction and that might be expected in plenary review.

Skidmore was succeeded two years later by the enactment of the Administrative Procedure Act. In Section 10(e) of the original Act, Congress provided that:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.[3]

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3. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946). For a current version of the Administrative Procedure Act, *see* 5 U.S.C. § 706 (1982) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

While it may have appeared that the evolving doctrine of deference enunciated in *Skidmore* was displaced by the Administrative Procedure Act, it subsequently became clear that this Court was still inclined to defer to administrative interpretations. In *Batterton v. Francis*, 432 U.S. 416 (1977), the Court considered an interpretation by the Secretary of Health, Education and Welfare of a provision of the Social Security Act. The precise question was whether a person was "unemployed" if he was out of work as a result of a labor dispute. This Court noted that Congress had expressly delegated to the Secretary the power to determine what constitutes unemployment. It said, in language which is particularly pertinent to the issue presented by this Petition:

> In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it could have interpreted the statute in a different manner.
>
> The regulation at issue in this case is therefore entitled to more than mere deference or weight, it can be set aside only if the Secretary exceeded his statutory authority or if the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Batterton v. Francis, 432 U.S. 416, 425-26 (1977) (citations omitted).[4]

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4. And *see Martin v. Occupational Safety and Health Review Comm'n*,

(Cont'd)

Seven years later, this Court eroded even further the court's authority to displace an agency's construction of statutory provisions with its own. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court considered whether the statutory term "stationary source" could be construed to include an entire industrial plant — a construction placed on the term by the Environmental Protection Agency. This Court granted the Agency view controlling weight — not mere deference — and did so without finding an explicit delegation to the Agency of authority to construe the statute. Instead, it noted the need for administrative agencies to fill the gaps left in statutes, left either implicitly or explicitly by Congress. Where gaps were left explicitly, the Agency was expressly delegated the authority to construe, and the construction would be given controlling weight. Gaps could also be left implicitly. In such a case, this Court held, ". . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted).

This Court made administrative interpretations even less vulnerable to review in *Young v. Community Nutrition Inst.*, 476

(Cont'd)

___ U.S. ___, 113 L. Ed. 2d 117 (1991). In *Martin*, the Court considered the question of which of two conflicting but reasonable administrative interpretations of a facially amgiguous OSHA regulation was to be preferred. This Court held that a reviewing court may not prefer the reasonable interpretations of the OSHRC to the Secretary of Labor. Many of the reasons given for deference to the Secretary's interpretation — the Secretary is legislatively vested with the power to authoritatively interpret the regulations; the Secretary is in the best position to reconstruct the purpose of the regulations; the Secretary routinely comes into greater contact with regulatory problems and applications of the regulations — are sound reasons for according deference to the reasonable interpretation of the Board of Adjustment.

U.S. 974 (1986). In *Young*, the Court considered a provision found in the Federal Food, Drug, and Cosmetic Act. Section 346 of the Act provided that when a poisonous or deleterious substance required in the production of food or which could not be avoided by good manufacturing practice, ". . . the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health." The issue was whether, when poisonous or deleterious substance was unavoidable in food, Section 346 required the Secretary to promulgate regulations in every such case, or to promulgate regulations only if he found them necessary for the protection of public health. The FDA construed the regulation to mean that the Secretary was to make a determination as to whether it would require limiting regulations. If the Secretary decided the regulations were necessary, the Secretary would then set tolerances. That is, the provision did not require regulations in every instance where poisonous or deleterious substances in food were unavoidable. This Court, although agreeing with the Court of Appeals that Community Nutrition Institute's contrary reading of the statutory provision was more logical, determined that the FDA's construction was a permissible reading. It noted that, according to *Chevron*:

> . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. [citation omitted]

Young v. Community Nutrition Inst., 476 U.S. 974, 980 (1986), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The *Young* Court

found the FDA's interpretation of Section 346 to be sufficiently rational to preclude it from substituting its own judgment for that of the Secretary.

It should be noted that *Young* is to be distinguished from *Chevron*. In *Chevron*, the resolution of the ambiguity required the Agency's technical expertise and a need to resolve conflicting policies. In *Young*, the ambiguity by no means involved the interpretation or the application of some technical term requiring the expertise of an administrative agency to provide the proper construction. Rather, the question presented in *Young* was one of pure statutory construction requiring no arcane expertise. Accordingly, the *Young* Court found an implicit delegation to the Agency to construe provisions of an enabling act involving a technical ambiguity or need to resolve a policy conflict. The net effect of *Young* seems to be something close to a grant of controlling weight to any agency interpretation of a statute that it administers.[5] It would appear that the New Jersey courts,

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5. Neither *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), nor *National Labor Relations Bd. v. United Food and Commercial Workers Union*, 484 U.S. 112 (1987), are to the contrary. In *Cardoza-Fonseca*, the INS had interpreted two provisions according to which an otherwise deportable alien can seek relief. According to Section 243(h) of the Immigration and Naturalization Act, an alien is relieved from deportation if he can show that his "life or freedom would be threatened." Section 208(a) of the Refugee Act of 1980 provides discretion to the Attorney General to grant asylum to an alien who will not or cannot return home "because of persecution or a well- founded fear of persecution . . . ." The INS interpreted two provisions to be equivalent. This Court observed that the question of whether two standards are the same is a quite different one from the question of interpretation that arises in each case in which the agency applies either of those standards to a particular set of facts. It held the question of whether the Congress intended the two criteria to be identical to be a pure question of statutory construction for the courts to decide. In *United Food and Commercial Workers Union*, the Court reiterated that pure questions of statutory construction are for the courts

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although they express it differently, have much the same view of their role in reviewing agency determinations. As one New Jersey appellate court said in the context of a review of an interpretation of a municipality's Board of Adjustment:

> A threshold issue is the standard of review appropriate to test the Board's determination . . . . There were no disputed facts, and the Board's determination was not reached upon a choice between factual contentions. For that reason, the rule that we uphold the factual determinations of an administrative agency if they are supported by sufficient credible evidence is not apposite. Cf. *Rowatti v. Gonchar,* 101 *N.J.* 46, 51 (1985). Also, what we are reviewing is not an exercise of the Board's expert discretionary judgment, as in the case of the grant or denial of a variance, see *Kramer v. Bd. of Adjust., Sea Girt,* 45 *N.J.* 268 (1965), but rather its reading of an ordinance and its application to an undisputed state of facts. See *Jantusch v. Borough of Verona,* 41 *N.J.Super.* 89, 196 (Law Div. 1956), aff'd 24 *N.J.* 326 (1957). Thus, we are guided by the traditional rule that the interpretation of legislative enactments is a judicial function, and not a matter of administrative expertise. *Mayflower Securities v. Bureau of Securities,* 64 *N.J.* 85, 93 (1973) . . . ."

Cherney v. Zoning Bd. of Adj., 221 N.J. Super. 141, 144-145

(Cont'd)

and that where the interpretation question involves the application of a standards to a particular set of facts, the courts must respect the interpretation of the agency.

(App. Div. 1987). And *see Urban v. Planning Bd.*, 238 N.J. Super. 105 (App. Div. 1990).

At issue in the trial court below was the meaning of several provisions of Union Township's Land Development Ordinance as applied to an array of facts. The New Jersey Legislature, according to N.J.S.A. 40:55D-70(b), specifically delegated the responsibility to the Township's Board of Adjustment to hear and decide requests for interpretarion of the Township's Zoning Ordinances. In the exercise of that authority, the Board, at a public hearing, took testimony from Chez Sez' representative and received and considered documentary evidence. Chez Sez, represented by its counsel, commented for the benefit of the Board on the application of the relevant provisions of the Land Development Ordinance to the facts as they were established by the evidence before the Board. The Board received on the record in the same proceeding the opinion of *its* counsel and after some brief discussion resolved to adopt its counsel's opinion. In a subsequent proceeding, the Board's action was memorialized by a formal written resolution read to and adopted by the Board. A verbatim record of both proceedings was made. New Jersey's Rules Governing Civil Practice Rule 4:69-6(b)(3) allows judicial review of the Board's action on the record made by the Board by means of an action in lieu of prerogative writ brought within forty-five (45) days from the date of publication of notice of that action.

Under these circumstances, and given the limited scope of the New Jersey court's review of the Board's interpretation, there would seem to be no point in requiring the New Jersey courts to place their impramatur on the Board's interpretation in order to "settle" the otherwise ambiguous ordinance for *Pullman* purposes. Indeed, were the action taken by the Board that of a federal agency, *Batterton* would allow the Board's interpretation to be set aside only if the court found that it exceeded the Board's statutory authority for its acts or its interpretation was "arbitrary,

capricious, an abuse of discretion or otherwise not in accordance with law." *Batterton v. Francis,* 432 U.S. 416, 425-26 (1977). There was ample reason to believe that the New Jersey courts would treat the Board's interpretation in the same fashion. *See, e.g., Cherney v. Zoning Bd. of Adjustment,* 221 N.J. Super. 441 (App. Div. 1987). And *see Urban v. Planning Bd.,* 238 N.J. Super. 105 (App. Div. 1990).

Indeed, this Court has held in other circumstances that administrative determinations and proceedings are sometimes entitled to be considered on the same footing as judicial determinations and proceedings. A strong analogy may be drawn between this case and *University of Tennessee v. Elliott,* 478 U.S. 788 (1986). There, the Court held that when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give that agency's fact finding the same preclusive effect to which it would be entitled in the state's courts (with certain exceptions not relevant here). Such a policy, this Court said:

> . . . serves the value underlying general principles of collateral estoppel: enforcing repose. [footnote omitted] This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources [citation omitted] is equally implicated whether fact finding is done by a federal or state agency.
>
> Having federal courts give preclusive effect to the fact finding of state administrative tribunals also serves the value of federalism.
>
> . . . [T]his [value] is served by giving

> preclusive effect to state administrative fact-finding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results. [footnote omitted] . . . .

University of Tennessee v. Elliott, 478 U.S. 788, 798-799 (1986). And *see Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. ____, 115 L. Ed. 2d 96 at 104 (1991).

It has been said that:

> To the extent that administrative adjudications resemble courts' decisions — a very great extent — the law worked out for courts does and should apply to agencies.

4 K. Davis, *Administrative Law Treatise*, Section 21.9, p. 78 (2d Ed. 1983), quoted in *University of Tennessee v. Elliott*, 478 U.S. 788, 798 n.6 (1986). According to the Restatement (Second) of Judgments § 83, p. 269 (1982):

> Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

Id. And *see Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (*Younger v. Harris* abstention doctrine held to apply where school brought federal suit to enjoin proceeding by state agency investigating alleged sex discrimination in school's hiring and termination decisions); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457

U.S. 423 (1982) (administrative proceedings to discipline lawyer initiated by state ethics committee were "judicial in nature" and would not be enjoined by federal courts); *Gibson v. Berryhill*, 411 U.S. 564, 576-77 (1973) (administrative proceedings looking toward the revocation of a license to practice medicine may, in proper circumstances, command the respect due to court proceedings).

Chez Sez clearly had "an adequate opportunity to litigate" its interpretation question before the Board of Adjustment. The issues were framed by a formal written request for an interpretation, just as issues in judicial proceedings are framed by pleadings. Chez Sez was allowed to present testimony and documentary evidence and was subject to cross-examination by members of the Board. Both Chez Sez and the Board were represented by counsel. The Board made factual findings after hearing argument by Chez Sez' counsel, applied legal principles to the facts arrayed by the evidence and rendered its decision in a subsequent formal proceeding. A verbatim record of both proceedings was made and Chez Sez was entitled to appeal from the Board's determination. As noted earlier, the Board's rendition of its interpretation was done according to an express statutory grant of jurisdiction. The Board's interpretation, then, was distinctly court-like behavior. There is no reason why, under the circumstances, its unreviewed interpretation should not be entitled to the same deference as unreviewed findings of fact made by the administrative law judge in *University of Tennessee v. Elliott*.[6]

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6. Petitioner's research reveals no federal court decision which is in conflict with the conclusion it reaches here. *Compare United Services Auto. Ass'n v. Muir*, 792 F.2d 356 (3rd Cir. 1986). In *Muir*, the court found the relevant provisions of the Pennsylvania Insurance Act to be ambiguous. Although they had been interpreted by the Commissioner, the court found the Commissioner's administrative interpretation insufficient to remove ambiguity for *Pullman* purposes. The interpretation did not arise, however, in the context of an

(Cont'd)

Accordingly, petitioners urge that, to promote repose and the principles of federalism, where an independent administrative agency acting according to a statutory grant of authority in a judicial or quasi-judicial capacity provides an interpretation of state law and that construction leaves no ambiguity, even though its determination is unreviewed, that provision of state law should be considered "settled" for *Pullman* abstention purposes.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit filed in this action on September 24, 1991. In the event that the petition is granted, petitioners pray that the judgment of the court below be reversed, that the cause be remanded and that the court below be directed to enter an order reversing the determination of the district court

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(Cont'd)

administrative hearing in which *United Services Auto Ass'n* had a "full and fair opportunity" to influence the outcome. In *Georgevich v. Strauss*, 772 F.2d 1078 (3rd Cir. 1985), the court was influenced in *declining* to abstain on *Pullman* grounds by the fact that counsel for the defendant state court judges had conceded an interpretation of the statute in question which would obviate the need for decision of federal constitutional questions attempted to be presented by the plaintiffs. In *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8 Cir. 1982), the court found *Pullman* abstention inappropriate as no unsettled question of state law was presented. Accordingly, the Director's and the Commissioner's interpretation of the Insurance and Takeover Acts, as well as the Williams Act, was irrelevant. In *Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980), the court acknowledged that, "Indeed, there may be circumstances in which a federal court would be bound by the administrative interpretation of a state agency." The court found, however, that the statutory provision in question was utterly ambiguous and had been given conflicting interpretations by the administrative agency charged with enforcing it and the agency's own Executive Secretary-Director. Accordingly, the court found the circumstances inappropriate for resort to an administrative interpretation.

to abstain and to administratively dismiss, to remand the cause to the district court for a decision on the petitioners' preliminary injunction application, and for such other and further proceedings as may be taken consistent with this Court's opinion.

Respectfully submitted,

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Dated: December 11, 1991

APPENDIX A — OPINION, *CHEZ SEZ III CORP., ET AL. V. TOWNSHIP OF UNION, ETC., ET AL.*, 945 F.2d 628 (3rd Cir. 1991)

Filed September 24, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5912

CHEZ SEZ III CORP., a corporation of the State of New Jersey; JACK CHESNER,

Appellants

vs.

TOWNSHIP OF UNION, a political sub-division of the State of New Jersey; SALVATORE J. MAURO, Construction Official of the Township of Union, in his official capacity,

Appellees

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 90-3882)

Argued April 3, 1991

Before: MANSMANN and HUTCHINSON,
Circuit Judges, and
O'NEILL, *District Judge*.*

Filed September 24, 1991

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* Honorable Thomas N. O'Neill, Jr. of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

O'NEILL, District Judge

Chez Sez III Corp. and its shareholder Jack Chesner appeal from an interlocutory order of the district court denying their motion for a preliminary injunction and administratively terminating their federal lawsuit pending the resolution of state law questions by the New Jersey state court. We find that abstention was proper and that appellants are unlikely to prevail on the merits of their suit. We will therefore affirm the decision of the district court.

I.

The facts of this case are not in dispute. Appellant Chez Sez III Corp. ("Chez Sez") operates an adult book and videotape store in Union Township, New Jersey. Chez Sez sells adult books and magazines, sundries, adult games and novelties, adult videotapes, and videotape players. In addition, it offers videotape player repair

services and rentals of adult videotapes and portable video cameras. Until September 17, 1990, Chez Sez also provided private video presentations in eight individual coin-operated booths. A customer could enter one of the booths and, for each quarter inserted, view one 90-second segment of video film taken from Chez Sez's stock of videotapes. It is Union Township's termination of the use of these booths which gives rise to this dispute.

The property leased by Chez Sez for its retail store is located in a "Business B" zoning district as defined by the Union Township Land Development Ordinance ("Zoning Ordinance" or "Ordinance"). The Zoning Ordinance requires varying numbers of off-street parking spaces depending upon the use of the property. For retail uses, one off-street parking space for each 200 square feet of gross floor area must be provided. For theater uses, one space for every three seats is required. The configuration of the property on which Chez Sez is located makes it impossible to provide the requisite number of parking spaces for either of these uses. However, since the property's use as a retail establishment predates the effective date of the Zoning Ordinance provisions regarding off-street parking, the use of the property for retail sales and services has been allowed as a nonconforming use with respect to the off-street parking requirements.

Union Township has taken the position that the video viewing booths installed by Chez Sez constitute a new, non-retail use of the property. On August 1, 1990, the Union Township Board of Adjustment (the "Board") held a hearing pursuant to an application by Chez Sez and its shareholder

Appendix A

Jack Chesner seeking an interpretation of the Zoning Ordinance. The Board found that the video booths did not constitute a retail use of the property. Since customers could come in, view a number of tapes and leave the premises without purchasing or renting any merchandise from the store, the Board found the video booths to be separate and distinct from the store's sales, rental and service functions. It concluded that the video booths were more in the nature of an amusement or movie theater use and thus were not permitted as a retail use under the Zoning Ordinance.

The Board then went on to find that the video booths did not constitute a theater use under the Ordinance either, since the provisions of the Zoning Ordinance dealing with theaters seemed to contemplate only large, auditorium-type uses rather than small private areas where individuals could observe videos in complete privacy. The Zoning Ordinance provides that any use not specifically permitted under the Ordinance is prohibited. The Board thus concluded that since video booths are not a valid retail use or theater use, the video booths operated by Chez Sez are prohibited in all of Union Township.

On September 17, 1990, following the decision of the Board, Union Township Construction Official Salvatore Mauro and several police officers entered the Chez Sez premises, evicted several patrons from the video booths, and erected a plywood wall at the entrance to the video viewing room to prevent its further use. The video booths and the portion of the store where they are located have not been used since that time.

Appendix A

II.

Chez Sez and Chesner filed a complaint in the District Court of New Jersey on September 28, 1990, seeking to have the court: (1) declare the Board's interpretation of the Zoning Ordinance unconstitutional; (2) enjoin the Township from enforcing the Ordinance (as interpreted by the Board) against them; and (3) require Construction Official Mauro to issue a certificate of occupancy allowing Chez Sez to operate video viewing booths on its current premises.

The district court found that a prohibition against all showing of video films in private booths in any part of the Township would be a violation of Chez Sez's First Amendment rights. However, the district court also concluded the Board's interpretation of the Zoning Ordinance lacked rationality. It predicted that a New Jersey court would most likely interpret the Zoning Ordinance to find that video booths are a "theater use" under the Ordinance. Although theaters are not permitted on this particular property, because it is not large enough to include the requisite number of off-street parking spaces for theater uses, the video booths would, if classified as a theater use, be permitted elsewhere in the Township. The district court thus concluded that Chez Sez's First Amendment claim would be eliminated if the booths were found to be a "theater use" under the Ordinance.

Since the district court found that the Zoning Ordinance was amenable to a construction by the state courts which would obviate the need for federal adjudication of a constitutional issue, it decided to abstain pursuant to the doctrine

articulated in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), in order to allow the state court to rule in the first instance upon the proper interpretation of the Zoning Ordinance.

The district court also denied appellants' request for preliminary injunctive relief based on its prediction that the Zoning Ordinance would be interpreted to find that video booths were a "theater use" under the Ordinance. Since Chez Sez could constitutionally be prohibited from operating a "theater" in this particular location, the district court denied Chez Sez's request for injunctive relief and administratively terminated its lawsuit. Chez Sez and Chesner then filed suit in the Superior Court of New Jersey on October 26, 1990.

We have jurisdiction over the appeal from an order administratively terminating a lawsuit pending the resolution of state court proceedings. 28 U.S.C. § 1291; *Blegenwald v. Fauver*, 882 F.2d 748, 750 (3d Cir. 1989). In addition, we have jurisdiction over the appeal from an interlocutory order denying a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

III.

In general, federal courts are bound to adjudicate all controversies which are properly before them. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 2512-13, 105 L.Ed.2d 298 (1989). Abstention from the exercise of federal jurisdiction is appropriate only under certain limited circumstances, for abstention is "the exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81

L.Ed.2d 186 (1984) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). However, when a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention may be justified under principles of comity in order to avoid "needless friction with state policies." *Railroad Comm'n of Texas v. Pullman*, 312 U.S. at 500. This doctrine is commonly referred to as "*Pullman* abstention."

The first step in the *Pullman* analysis is to determine whether three special circumstances exist:

> (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court;
> (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims;
> (3) A federal court's erroneous construction of state law would be disruptive of important state policies.

D'Iorio v. County of Delaware, 592 F.2d 681, 686 (3d Cir. 1978), *overruled on other grounds*, *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3d Cir. 1982) (in banc).

If the district court finds that all three of the "special circumstances" are present, it must then make a discretionary determination as to whether abstention is in fact appropriate under the circumstances of the particular case, based on the

weight of these criteria and other relevant factors. *Id.*

In reviewing a district court's abstention decision, we apply two separate standards of review. The district court's determinations as to the first two "special circumstances", that is, whether state law is uncertain and whether state law is amenable to a construction that would obviate or narrow the constitutional issues presented, are essentially legal decisions which are to be reviewed *de novo* by this court. *Id.* However, the district court's appraisal of the third factor, that is, whether an erroneous decision of state law by the federal court would disrupt important state policies, is more discretionary in nature and thus, if it is adequately explained, will be accorded greater deference by the appellate court. *Id.*

If we agree with the district court that all three of the "special circumstances" are present and that the case thus falls within the general ambit of *Pullman*, "the remaining question is whether the trial judge abused his discretion in weighing the advantages and disadvantages of abstention and deciding to invoke the *Pullman* doctrine." *Id.* (quoting *Frederick L. v. Thomas*, 578 F.2d 513, 517 (3d Cir. 1978)).

IV.

With these general principles in mind, we will now consider the applicability of the *Pullman* abstention doctrine to the circumstances of this particular case.

The federal constitutional claim made by appellants here is that the Zoning Ordinance, as construed by the Board, totally prohibits private video viewing booths from all parts of Union

Township and thus impermissibly infringes on appellants' constitutional right to freedom of expression under the First Amendment.[1] *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). On its face, the Union Township Zoning Ordinance does not specifically prohibit video viewing booths from the Township. The Ordinance instead sets forth the types of uses which are permitted in the various zoning districts of Union Township, then states that "[a]ll uses not expressly permitted by this ordinance are prohibited." Ord. Sec. 613.I. Since the Board found that video viewing booths did not constitute a permitted use under the Ordinance, it concluded that such booths were prohibited in all districts of Union Township.

There are only two classifications of uses permitted in Union Township into which the video viewing booths could conceivably fall: (1) "Stores and Shops for Retail Sales of Goods and Services", and (2) "Motion Picture Theaters". Ord. Sec. 605. A "Retail Store" is defined under the Ordinance as "[a] building or part thereof in which or from which merchandise is sold directly to the ultimate consumer." Ord. Sec. 200. Similarly, a "Retail Shop" is defined as "[a] building or part thereof in which or from which a service is rendered directly to the ultimate consumer." Ord. Sec. 200. Motion picture theaters are not defined under the Ordinance.

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1. In applying the *Pullman* doctrine, we need not reach the issue of whether such a prohibition would, in fact, constitute a violation of Chez Sez's First Amendment rights.

Appendix A

A. *Uncertainty of State Law*

For *Pullman* to apply, the state or local law underlying the federal constitutional issue must be uncertain. *D'Iorio*, 592 F.2d at 686. Our initial inquiry focuses on whether the language of the Ordinance is "clear and unmistakable." *Hughes v. Lipscher*, 906 F.2d 961, 965 (3d Cir. 1990). Chez Sez takes the position that a "retail shop" (as defined by Ord. Sec. 200) can include video viewing booths since they provide "a service . . . directly to the ultimate consumer." However, the Board found, and the district court agreed, that since customers could come in and view several videotapes without ever purchasing or renting any merchandise from the store, the video booths were separate and distinct from the store's sales, rental and service functions, and thus did not constitute a retail use of the property. Since we find that either interpretation constitutes a plausible construction of the Ordinance, the language of the Ordinance is ambiguous on its face.

Similarly, since the term "motion picture theater" is not defined under the Ordinance at all, it is unclear whether the term encompasses only large, auditorium-style uses, as the Board found, or whether it could instead be read more broadly to also include private video viewing booths of the type involved here. The term "motion picture theater", as it is used in the Ordinance, is also ambiguous on its face.

If an otherwise ambiguous statute has been authoritatively construed by the state courts, abstention would not be appropriate. *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 361 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). The

sections of the Union Township Zoning Ordinance here at issue have never been interpreted by the New Jersey courts. Although the Board of Adjustment has made a definitive ruling interpreting these sections of the Ordinance, "an administrative interpretation of a facially ambiguous statute will not remove the ambiguity, for *Pullman* purposes." *Id.* at 362. We therefore conclude that the Zoning Ordinance presents unsettled issues of state law, and that the first of the three *Pullman* factors has thus been met.

B. *Effect of State Law on the Constitutional Claim*

The second factor to be considered in the *Pullman* analysis is whether the Ordinance is amenable to an interpretation by the state courts that would obviate the need for or substantially narrow the scope of the constitutional issues. *D'Iorio*, 592 F.2d at 686. We are not concerned with whether there is "a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary", but rather whether the Ordinance is "obviously susceptible of a limiting construction". *Hawaii Housing*, 467 U.S. at 237 (emphasis in original).

Appellants' constitutional claim is that the Zoning Ordinance, as construed by the Board, totally prohibits video viewing booths in all parts of Union Township in violation of appellants' First Amendment right to freedom of expression. However, the state court might conclude that private video viewing booths constitute a "motion picture theater" use under the Zoning Ordinance. If so, Chez Sez could operate its video viewing booths in any district of Union Township where

theaters are permitted, and the basis for its constitutional claim would be eliminated.[2]

This case presents exactly the type of state law question that usually triggers *Pullman* abstention, where "the unsettled issue of state law principally concern[s] the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular matter would eliminate the constitutional issue and terminate the litigation." *Baggett v. Bullitt*, 377 U.S. 360, 376-77, 84 S.Ct. 1316, 1325, 12 L.Ed.2d 377 (1964). The second *Pullman* factor has thus been met.

C. *Effect of an Erroneous Federal Court Decision of State Law*

In evaluating the third *Pullman* factor, whether an erroneous decision by the federal court would be disruptive of important state policies, this court will generally defer to the district court's appraisal if it is "adequately explained." *D'Iorio*, 592 F.2d at 686. The district court found that "zoning regulations implicate important state policies" and that an "erroneous[] construc[tion of] the Zoning Ordinance in this case . . . would be disruptive of those policies." App. at 112. We agree. Land use issues are an area of particularly local concern which involve questions of both state and municipal law. As Justice Marshall stated in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94

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2. Appellants make no claim that Union Township could not constitutionally restrict the location of video viewing booths (and other "theaters") within the Township, but only that a complete ban on this medium of expression throughout the Township would violate their First Amendment rights.

S.Ct. 1536, 39 L.Ed.2d 797 (1974) (dissenting on other grounds):

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life . . . Our role is not and should not be to sit as a zoning board of appeals.

416 U.S. at 13. Since we find that there is an adequate basis for the district court's conclusion that land use issues implicate the type of important state policies for which *Pullman* abstention is appropriate, the third *Pullman* prerequisite has also been met.[3]

D. *Equitable Considerations*

Having found that all three of the "special circumstances" necessary to invoke the *Pullman* doctrine are present in this case, the only question remaining is whether the district court abused its discretion by abstaining in this case. We have held that "absent significant reasons to the contrary, abstention is generally proper once it [has been] ascertained that the threshold 'special

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3. Our decision in *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982), is not to the contrary. *Heritage Farms* was a civil rights action involving allegations of conspiracy on the part of local zoning officials. In that case, we found that the "mere presence of land use issues" was not enough to "trigger a mechanical decision to abstain", *id.* at 748, where there were no unsettled issues of state law to be resolved. Here, however, we are clearly presented with an unsettled issue of land use law.

circumstances' have been fulfilled." *D'Iorio*, 592 F.2d at 691-92.

Chez Sez argues that the potential deprivation of its First Amendment rights during the pendency of the state court adjudication is of such importance as to render abstention inappropriate in this case. However, while the Supreme Court has been "particularly reluctant to abstain in cases involving *facial* challenges to the First Amendment," *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S.Ct. 2502, 2513, 96 L.Ed.2d 398 (1987) (emphasis added), an "as applied" challenge presents different considerations. When a facial challenge is involved, abstention is generally not appropriate because "extensive adjudications, under a variety of factual situations, [would be required to bring the statute] within the bounds of permissible constitutional certainty," *Baggett v. Bullitt*, 377 U.S. 360, 378, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), a result which would be "quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *Id.* at 379.

Such concerns, however, are not implicated where an "as applied" challenge to the First Amendment is made. We are presently faced with a challenge that the Union Township Zoning Ordinance is unconstitutional, not on its face, but only as it was interpreted by the Union Township Board of Adjustment and applied to the appellants. Where the state courts can, in a single proceeding, determine the bounds of the state statute by choosing between one or several alternative meanings of the statute, abstention has been held proper even where a First Amendment challenge is concerned. *See, e.g., Babbitt v. United Farm*

Workers, 442 U.S. 289, 308, 99 S.Ct. 2301, 2314, 60 L.Ed.2d 895 (1979). The mere fact that the Ordinance is being challenged on First Amendment grounds is not enough to automatically render *Pullman* abstention inappropriate in this case.

In sum, we find that the district court did not abuse its discretion in abstaining pursuant to the *Pullman* doctrine. We will therefore affirm the district court's decision to abstain in this case.

IV.

In addition to abstaining in this action, the district court denied appellants' motion for injunctive relief.[4] We review the denial of a preliminary injunction for an abuse of discretion, error in applying the law, or a clear mistake in considering the proof. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 (3d Cir. 1989).

A preliminary injunction is an "extraordinary remedy" which will be granted only if the moving party can demonstrate:

> (1) the reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court "should take into account, when they are relevant, (3) the

4. Although the district court decided to abstain in this action, it was still obliged to consider appellants' request for preliminary relief. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 887 (3d Cir. 1981).

> possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest."

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d at 800 (quoting *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982)). In applying this standard, the district court concluded that a preliminary injunction was not warranted in this case because appellants were unlikely to succeed on the merits of their suit.

We agree. The Board concluded, and the district court agreed, that the video booths installed by Chez Sez were not a retail use of its property. Even though Chez Sez's premises could not conform with the parking requirements of the Ordinance, appellants had been permitted to continue using the property for retail purposes because the property was used for retail purposes before the parking requirements were enacted. *See* N.J.S.A. 40:55D-68. However, under New Jersey law, a nonconforming use cannot be expanded to include other types of uses:

> our courts have held that an existing nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance. In that regard nonconforming uses may not be enlarged as of right except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference. Where there is doubt as to whether an enlargement or change is substantial rather than insubstantial, the courts have consistently

declared that it is to be resolved against the enlargement or change.

Belleville v. Parrillo's, Inc., 83 N.J. 309, 316, 416 A.2d 388, 391-92 (1980) (citations omitted). Thus, Chez Sez may not use the property for any use other than retail sales and services. Since the district court found that video booths were not a retail use, it concluded that appellants were prohibited, under New Jersey law, from operating video booths on this particular property.

Appellants argue that their constitutional rights have been violated because the Board interpreted the Ordinance as prohibiting video booths in all of Union Township. The district court, however, found the more plausible interpretation of the Ordinance to be that video booths are permitted in any zone where theaters are permitted. Under this interpretation, while Chez Sez could not operate a "theater" in its present location, since that would be an expansion of a nonconforming use, it could operate such theaters elsewhere in the Township.

Appellants, however, are not seeking to operate elsewhere in Union Township. The only relief they seek is to be able to operate video booths on this particular property. Appellants never attempted to operate video booths at another location nor did they ever express any intent to do so. Thus, even if the state court were to find that video booths are permitted elsewhere in Union Township, as the district court predicts, appellants would not be entitled to the relief they are seeking.

In sum, the district court found that video booths are likely to be permitted elsewhere in Union Township. The district court also found that

Chez Sez was prohibited from operating video booths on this particular property because New Jersey law prohibits the expansion of a nonconforming use. Under such circumstances, the district court's refusal to grant a preliminary injunction allowing appellants to operate video booths in their present location was neither an abuse of discretion nor an error of law. We will therefore affirm the order of the district court denying appellants' motion for a preliminary injunction.

V.

We conclude that the district court properly abstained pursuant to the *Pullman* doctrine, and that the district court properly denied appellants' motion for a preliminary injunction. We will therefore affirm the decision of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION, *CHEZ SEZ III CORP., ET AL. V. TOWNSHIP OF UNION, ETC., ET AL.*, CIVIL NO. 90-3882, OCTOBER 17, 1990 (UNPUBLISHED)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 90-3882

CHEZ SEZ III CORP., et al.,

Plainiffs,

-v-

TOWNSHIP OF UNION, etc., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
October 17, 1990

BEFORE: HONORABLE DICKINSON R. DEBEVOISE, UNITED STATES DISTRICT JUDGE

APPEARANCES:

EVANS, OSBORNE & KREIZMAN,
BY: LEWIS H. ROBERTSON,
Attorneys for the Plaintiff

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DAVID B. ZURAV,
Attorney for the Defendants

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

HOWARD A. PAPPAPORT
Official Court Reporter

[2] THE COURT: I'm going to put an opinion on the record and I'm going to ask the opportunity to review it after it is originally transcribed, make any corrections that will be necessary, and it can be filed and distributed.

Plaintiffs, Chez Sez III Corp. and its shareholder Jack Chesner, seek an order preliminarily enjoining defendants Township of Union and its Construction Official Salvatore J. Mauro from enforcing the Township's Land Development Ordinance to the extent that it prohibits plaintiffs from the private exhibition of videos to rental patrons in booth type, coin operated facilities contained in plaintiff's retail store located at 1521 Route 22, Union, New Jersey.

Findings of Fact

The facts are not in dispute.

Since before 1985, William Untracht has been the owner of the premises in question. The property is located in a B zone as defined by the Union Township Land Development Ordinance

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(herein referred to as the "Zoning Ordinance" or the "Ordinance"). Stores and shops for retail sales of goods and services are permitted uses.

For such retail uses the Ordinance requires one off — street parking space for each 200 square feet of floor area; for assembly hall use the Ordinance requires one off-street parking space for each 100 square feet of gross floor area; for a theater use the Ordinance requires one off-street parking [3] space for each three seats.

Because of the size and configuration of the property and the location of the improvements on it, it is impossible for the premises in question to provide parking spaces which meet the requirements of the Ordinance. However, improvements on the property have existed and have been used continuously for retail sales and service since before the effective date of the parking requirements of the Ordinance, and consequently such use may continue as a nonconforming use notwithstanding the failure to meet the requirements.

On January 25, 1985 Untracht applied to the Township's Construction Official for a permit to alter its building in order to divide an open space into three offices for sales units with toilets for retail sales according to plans drawn by John P. DePalma. Upon completion of construction an inspection was made and a certificate of occupancy was issued on March 5, 1986.

In the meantime, on November 17, 1985 Untracht leased the pertinent portion of the building to Chez Sez for a term commencing February 8, 1986. According to plaintiffs it was Chez Sez' intent to use the premises for the retail sales of general interest and adult books and magazines, sundries such as lotions, gels

and the like, and adult games and novelties. In addition, according to plaintiffs, Chez Sez intended to use some of the space for the retail sales and rental of video cassettes [4] and video playback and recording equipment and to offer to its customers brief individual viewings of video presentations in coin-operated, free standing, booth-type facilities.

The plans which had been submitted to the Township for approval on January 25, 1985, did not disclose the free-standing booths, and when Mauro inspected the premises prior to the issuance of a certificate of occupancy on March 5, 1986 no booths had been erected.

After occupying the premises and after issuance of a certificate of occupancy, Chez Sez erected an eight feet high partition dividing the western-most portion of the first floor of the leased premises into two equal sections — a front and a rear section. In the rear section Chez Sez assembled 11 prefabricated booths which were not connected to the floor, ceilings or walls. Coin-operated television monitors were placed in the eight western-most free-standing booths.

Chez Sez placed free-standing display racks and wall mounted display racks and pegboards within the easternmost portion of the first floor of the leased premises.

On or about September 1, 1986 Chez Sez commenced business. It sold its adult products, and sold and rented a large selection of adult videotapes. Customers were able to view adult videos in eight of the free-standing booths. Each booth had a selection of offerings. Insertion of a quarter provided a customer with a 90-second segment of a video film. [5] For eight quarters a customer could enjoy a 12-minute segment.

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Mauro, as Construction Official, inspected the premises and directed Chez Sez to remove the booths and to cease the viewing operations. In essence his position was that the installation of the booths did not conform with the certificate of occupancy and in view of the expanded use of the premises the use was in violation of the parking requirements of the Zoning Ordinance.

On December 8, 1986 Mauro signed a summons charging Chesner with violating the Zoning Ordinance by adding a new use with approval and for failure to obtain a certificate of occupancy for a new use.

On March 8, 1987 the summons was dismissed by agreement of the parties to permit plaintiffs to file a Superior Court action.

On July 28, 1987 plaintiffs filed a complaint in Superior Court seeking a declaratory judgment that their challenged use of the premises constitutes a retail use, or, alternatively, that the exhibition of videos in the free-standing, booth-type facilities is accessory to the sale, exchange and rental of video cassettes and video playback and recording equipment and, in any event, their use is not an assembly use. The complaint further alleged the deprivation of plaintiffs' civil rights and sought compensatory damages pursuant to 42 U.S.C. Section 1983 and attorneys' fees pursuant [6] to 42 U.S.C. Section 1983.

On August 17, 1988 the parties to the state proceedings entered into a "Stipulation of Dismissal of Plaintiffs" Claims for Compensatory Damages and Attorneys Fees pursuant to 42 U.S.C. Section 1983 only and with prejudice as to same."

On November 18, 1988 the state court judge dismissed the complaint for failure to exhaust administrative remedies.

Specifically, he held that the two zoning questions which plaintiffs raised should be decided in the first instance by the Board of Adjustment pursuant to its statutory authority to hear and decide appeals when it is alleged that an error has been made by the officer charged with responsibility for enforcing a zoning ordinance. N.J.S.A. 40:55D-70(a). On October 19, 1989 the Appellate Division of the Superior Court affirmed the Law Division decision.

Plaintiffs filed an appeal with the Union Township Construction Board of Appeals. The appeal was heard on February 1, 1990. The Board held that plaintiffs were required to file an application with the Board of Adjustment for a use variance, site plan approval, interpretation of the Zoning Ordinance and/or appeal from the decision of the Construction Official that there was a change of use. The Construction Board of Appeals confirmed fines in the amount of $7,500 which had been levied against Chesner but agreed to withhold further fines upon the plaintiffs completing an application and the filing to the [7] Board of Adjustment.

In early February 1990 Chez Sez made application to the Board of Adjustment pursuant to N.J.S.A. 40:55D-70a. The application recited that Chez Sez had applied to the Construction Official for a certificate of occupancy to use a portion of its premises for exhibition of video presentations in free-standing booths and that the Construction Official had declined to issue the permit because: "Change of use to booth-type facility from retail sales to place of amusement with insufficient parking under 707C1(1)."

Chez Sez urged in its petition essentially that the proposed use was a retail use within the meaning of the Zoning Ordinance

and could be continued as a lawful non-conforming use.

Plaintiffs' application was heard on August 1, 1990. On September 5, 1990 the Board of Adjustment rendered its decisions. Its counsel, E. Robert Levy, Esquire, explained the rationale for the Board's action. He noted that the applicant's attorney had urged that viewing of the tapes was part and parcel of the retail operations at Chez Sez. He stated that the Board had concluded: "The video booth 'use' is in fact distinct from the store's sales, rental and service functions, and does not itself fall within any use category set forth in the Land Use Ordinance as a permitted use. In this regard, it should be noted that any use not expressly permitted by our Ordinance is prohibited pursuant to Section 613-1."

[8] To support its findings that the proposed use was not retail in nature, Mr. Levy recited "The key fact here is patrons can watch movies on the subject premises without purchasing or renting a tape. They can watch as many of the videos as they wish to without purchasing and there is no attempt whatsoever to relate the observation or watching of a movie or a video to its purchase or rental. There is no limitation in terms of the time which the patron can spend watching a video or videos and there is no control over that function. Therefore, patrons can come into the subject premises, watch videos, and stay there virtually for hours without being disturbed. This is clearly a movie or amusement use and it is certainly not a retail sale or service use. It is not an accessory use. It does not serve to assist the retail sale. It is independent thereof and not permitted as indicated."

If Mr. Levy and the Board of Adjustment had stopped with the finding that video booth facilities extended beyond normal retail use as contemplated by the Zoning Ordinance, this case

might not have arisen; or at least it would have less colorable merit to it. Plaintiffs' use of the premises for retail purposes does not comply with the Zoning Ordinance because its parking facilities are inadequate. Plaintiffs' retail use is permissible only because it is a non-conforming use predating the enactment of parking requirements. It is hornbook law that a nonconforming use cannot be expanded without [9] becoming subject to all the provisions of the zoning law. In the present case there was an ample factual record to support the Board's conclusion that viewing videotapes in booths erected in a retail store expands the retail use to an entertainment use and thus constitutes an unlawful expansion of a non-conforming use unless a variance were obtained. That was ample grounds to affirm the decision of the Construction Official.

However, the Board, through Mr. Levy, went off on a discussion of other provisions of the Zoning Ordinance. He referred to provisions which permitted motion picture theaters in Business B and Business C zones. As to parking provisions he noted that the reference to parking for theaters classified them with auditoriums, churches, arenas and similar uses, indicating that the uses contemplated deal with large auditorium-type uses where patrons sit together in public groupings. Mr. Levy stated that "Plainly, video booths do not meet this type of criteria and are, in truth, the antithesis of these types of uses since they are small, very private areas for individuals to observe videos in complete privacy. This use, therefore, in my judgment is, at the very least, a form of motion picture use which is not permitted in the Township because it does not fall in the movie picture or motion picture use, that is, in fact, permitted."

Thus Mr. Levy and the Board of Adjustment have neatly presented plaintiffs with the constitutional issue. They start with the premise that what the Union Township Zoning [10] Ordinance

does not permit it prohibits. There are only two permitted uses which would fit plaintiffs video booth operation — i) retail use and ii) theater use. The Board found that video booth operations constituted entertainment use and therefore were not permitted as a retail use. The Board found that video booth operations were conducted on a small scale and in private and thus were not permitted as theater use. The net effect of all this, plaintiffs suggest, is to bar from all areas of Union Township video booth entertainment since it is not specifically permitted by any provision of the Zoning Ordinance.

To return to the unfolding of the events which led up to this lawsuit: After the Board of Adjustment adopted the interpretation of the Zoning Ordinance as expounded by its counsel on September 5, 1990 Construction Official Mauro ordered the Township's Police Chief to terminate the use and operation of plaintiffs' video booths. On September 17, 1990 Mauro and several police officers evicted several patrons from the booths and constructed a plywood wall at the entrance of the video viewing room to prevent its further use.

The complaint states in a conclusory fashion: "The actions taken by the Defendants Township of Union and Mauro were [1 because of their distaste for adult fair (sic) and according to a policy or custom of the Defendant Township of Union to limit, discourage or foreclose altogether, within its jurisdiction, sexually explicit communication expression." At [11] the hearing on the application for the preliminary injunction defendants' attorney alluded to undesirable sexual activity taking place in the booths. However, no evidence has been submitted which would support either the allegations in the complaint or the substance of defense counsel's comment. Thus I consider neither charge, since neither has support in the record.

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This action was filed on October 1, 1990. A hearing was held on October 11.

Conclusions of Law

The Court has jurisdiction of this action pursuant to 42 U.S.C. Section 1983.

Defendants' arguments for dismissing the action have no merit.

In an action brought pursuant to Section 1983 exhaustion of administrative remedies is not required. *Patsy v. Board of Regents,* 457 U.S. 496 (1982).

Plaintiffs are not collaterally estopped nor are they barred by the doctrine of res judicata by reason of dismissal of the state court damage claims on August 17, 1988. The events which are the subject of the present action took place after August 17, 1988 and could not have been the subject of the earlier case.

To obtain preliminary injunctive relief a plaintiff must establish a likelihood of success on the merits, that he [12] will suffer irreparable injury if relief is denied, that countervailing harm will not be inflicted upon the non-moving party and that the interest of the public has been weighed and not found to militate against the granting of the requested relief.

Here a First Amendment freedom of expression issue is implicated. If in fact interference with First Amendment rights has taken place or is threatened, irreparable harm is presumed. Injunctive relief will prevent such injury. In the present case it would not cause serious injury to defendants. There would simply

continue a use which has not been shown to have had an adverse effect during the past four years of its existence. Enforcement of First Amendment rights is always in the public interest.

The principal question, therefore, is whether plaintiffs have shown a likelihood of success on the merits. To summarize my conclusion in that regard: i) Had the Board of Adjustment simply held that the installation of video booths constituted an unlawful expansion of a non-conforming use, plaintiffs' First Amendment rights would not be violated by a prohibition of video booths in the Chez Sez premises. ii) However, as construed by the Board of Adjustment, the Zoning Ordinance prohibition against all showing of video films in private booths in any part of the Township is an infringement upon First Amendment rights, since no rational basis for such a [13] prohibition could have been advanced. iii) Since I have grave doubts that the Board of Adjustment's interpretation of the Zoning Ordinance is authoritative, *Pullman* abstention is appropriate in order to permit the state court to rule in the first instance upon the proper interpretation of the Zoning Ordinance.

This case is governed by *Schad v. Mt. Ephraim,* 452 U.S. 68 (1991). There the Supreme Court passed upon an ordinance which the highest court of New Jersey had construed to prohibit nude dancing in any commercial zone in the municipality. The Court held the municipality had failed to advance sufficient justification, as required by the First Amendment, for the exclusion of a broad category of expression long held to be within the Amendment's protection. Thus a conviction under the Ordinance was found to be unconstitutional.

In *Schad,* the operators of an adult book store sold adult books and films and provided booths in which a customer could

sit, insert a coin and watch an adult film. In addition, there was a coin-operated mechanism permitting the customer to watch a live nude dancer performing behind a glass panel. Only the nude dancer was the subject of the *Schad* case, but videotapes are no less a form of expression entitled to First Amendment protection. In view of their nature, privacy for many persons is a necessary condition for viewing adult films — thus the booths in which they are exhibited.

[14] As interpreted by the Board of Adjustment in the present case, viewing any kind of videotapes in booths is prohibited in business zones. While it is much more likely that patrons will wish to view adult fare in booths, under the Board of Adjustment's interpretation it would also be impermissible to use booths for the observation of videotape segments of *Bambi* or *Gone With The Wind*.

When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. A court must assess the substantiality of the justification offered for a regulation that significantly impinges on freedom of speech. In the present case as in *Schad*, "The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the (Township)." *Id.* at 67.

In the present case there is absolutely no justification for the total exclusion of videotape booths throughout the Township either on the face of its Zoning Ordinance or otherwise placed into the record. Instead, the Board of Adjustment relied on a highly technical mechanistic interpretation of the Zoning Ordinance which does not bear rational scrutiny.

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Without having to make a final determination of the question, it would appear at first blush that the Board of [15] Adjustment's conclusion of plaintiffs' operation of videotape booths goes beyond retail use rests upon a supportable factual finding and constitutes a reasonable legal conclusion. That being the case, Chez Sez' operation of a significant number of such booths would be an expansion of its operations, something which is not permitted of a non-conforming use without a variance. N.J.S.A. 40:55D-70d. Provided there were areas in the Township where videotape booths could be operated, I see no constitutional infirmity in applying zoning provisions which prevent a particular owner who cannot meet the zoning requirements from operating such booths.

The Board of Adjustment concluded that Chez Sez' booth operation was too much like a theater or auditorium use to constitute retail stores. However, to then conclude that such use was not theater or auditorium use because it was too negligible in scope is utterly lacking in rationality. From the perspective of zoning considerations, such as parking, street access, signs, traffic, the smaller scale video type operations have a much lesser impact than theaters, and to permit the latter while prohibiting the former would seem to be the ultimate in arbitrariness and the denial of equal protection, *e.g., City of Cleberne v. Cleberne Living Center, Inc.*, 472 U.S. 432 (1985).

Were I convinced that the Board of Adjustment interpretation of the Zoning Ordinance were correct, I would [16] have no choice but to enjoin its enforcement. However, I have grave doubts that its interpretation is correct.

On the one hand I note a plausible interpretation would justify denying Chez Sez' application to operate videotape booths without impinging on constitutional rights. On the other hand I find that

the Board's interpretation of the Ordinance which creates constitutional problems may very well be an incorrect one. Interpretation of the Ordinance is, of course, a question of State law which may only be decided authoritatively by the State courts.

This is a classic situation for the application of the *Pullman* abstention doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 196 (1941). Three special circumstances must generally be present before *Pullman* abstention can be considered.

> "First, there must be uncertain issues of state law underlying the federal constitutional claims brought in federal court. Second, the state law issues must be amenable to an interpretation by the state courts that would obviate the need or substantially narrow the scope of the adjudication of the constitutional claims. And third, it must appear that an erroneous decision of state law by the federal court would be disruptive of important state policies."

D'Iorio v. County of Delaware, 582 F. 2d 681, 686 (3d Cir. 1978).

All three of these considerations are present in this case. There is an uncertain interpretation of the Union Township Zoning Ordinance. The Board of Adjustment's conclusion [17] that operation of videotape booths is prohibited in a zone which permits theaters is debatable, to say the least. The state courts might well hold that the operation of videotape booths is a permitted use in a zone which permits theaters. If a state court did so hold, plaintiffs' attack on the Union Township Zoning Ordinance would fail because this particular form of expressive activity would no longer be totally barred from the Township. Finally, zoning

regulations implicate important state policies. Where I to erroneously construe the Zoning Ordinance in this case the effect would be disruptive of those policies.

Having determined that the three special circumstances are present, it is necessary to determine whether abstention is appropriate in this case. *Biegenwald v. Fauver,* Docket No. 08-6002 (3d Cir. Aug. 11, 1989). I conclude that it is.

In the first place, it seems to me that it is unlikely that a state court will interpret the Zoning Ordinance as did the Board of Adjustment. If, as seems likely, it were held that videotape booths are not prohibited in zones where theaters are permitted, the constitutional objection to the Ordinance would fall.

Further, the record before the Board of Adjustment might well support a finding that erection and operation of the videotape booths constituted an expansion of a non-conforming use. Since the premises did not meet the parking or perhaps other requirements of the Zoning Ordinance, such expansion would [18] be unlawful and could be terminated by the Township.

I cannot say with certainty that the facts and the applicable New Jersey law would lead a New Jersey court to arrive at this conclusion, but on the record before me it seems a likely result. If so, the Township's efforts to terminate the expanded use would be lawful.

In these circumstances it is appropriate for plaintiffs to seek a resolution of the state law questions in the state courts. If they wish a federal court to decide the federal questions, if any, which remain after disposition of the state issues, they may file an *England* reservation in the state court. *England v. Louisiana State*

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Board of Medical Examiners, 375 U.S. 411 (1964).

Since I conclude that under the most reasonable interpretation of the Zoning Ordinance it is likely that Chez Sez could be prevented, without violating the Constitution, from operating videotape booths, I do not think a preliminary injunction is appropriate pending determination of the state law issues. I shall stay proceedings in the present action and administratively terminate it with the right of any party to move to reopen it upon completion of the state law proceedings or otherwise.

I shall prepare and file an appropriate order.

[Colloquy between the Court and Counsel omitted.]

The order will read simply for the reasons set forth from the Court's bench opinion of even date, it is this 10th day of October, 1990 ordered as follows: One, plaintiffs' motion for preliminary injunction is denied.

Two, this action is stayed pending a resolution of the state law questions referred to in said opinion by the Court to the State of New Jersey.

[21] Three, the action is administratively terminated with the right of any party to move to reinstate the action on the actual calendar upon completion of the state proceedings or otherwise for good cause.

It is my opinion that this is an appealable order by the plaintiffs because it is a denial of an applicaton for preliminary injunction and by the defendant because I administratively terminated it.

APPENDIX C — RESOLUTION OF INTERPRETATION OF BOARD OF ADJUSTMENT OF THE TOWNSHIP OF UNION, IN RE: CHEZ SEZ III CORP., FOR AN INTERPRETATION TO INTERPRET WHETHER VIEWING BOOTHS CONSTITUTE A CHANGE FROM RETAIL, ON PREMISES LOCATED AT 1521 ROUTE 22, BLOCK 1806, LOT 10, UNION, NEW JERSEY, CALENDAR NO. 2475, SEPTEMBER 5, 1990

IN RE: CHEZ SEZ III CORP., FOR AN INTERPRETATION TO INTERPRET WHETHER VIEWING BOOTHS CONSTITUTE A CHANGE FROM RETAIL SALES, ON PREMISES LOCATED 1521 ROUTE 22, BLOCK 1806, LOT 10, UNION, NEW JERSEY.

Union, New Jersey
September 5, 1990

BEFORE:

THE TOWNSHIP OF UNION BOARD OF ADJUSTMENT
ARTHUR RUSSO, Chairman
RONALD D. BUNDICK, Member, Absent
GEORGE PETKOV, Member
STARKS W. LEWIS, Member
GENNARO J. PETTI, Member
ALBERT L. KESSLER, Member
RONALD WINHOLD, Member
LULA YOUNG, Member
BARNEY CAPRIGLIONE, Member
SALVATORE J. MAURO, Building Inspector

APPEARANCES:

E. ROBERT LEVY, ESQ.
Attorney for the Board

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DAVID B. ZURAV, ESQ.
Attorney for the Township of Union
and Salvatore J. Mauro

[2] CHAIRMAN RUSSO: We will now continue with Calender No. 2475, Chez Sez III Corporation, for a Resolution of Interpretation. The Resolution of Interpretation is to interpret whether viewing booths constitute a change from retail sales.

MRS. YOUNG: Mr. Chairman, let the record show that I am stepping down from this case.

CHAIRMAN RUSSO: All right. You may proceed, Mr. Levy.

MR. LEVY: You will all have to listen to this resolution. We have not been able to pass this one out because I didn't have the transcript until today.

This is a request for an interpretation from Union Township's Land Development Ordinance. The matter was heard by the Board on August 1, 1990 at which time the applicant, Chez Sez III Corporation appeared through its counsel, Lewis Robertson, who presented Jack B.Chesner, a principal and officer of the applicant, [3] as his sole witness.

Mr. Chesner testified with regard to the subject use which is located at 1521 Route 22 Westbound, which property is owned by William Untract. The premises was previously utilized by Great Bear and the western-most portion is now leased by the applicant.

The subject property is located in a Business B Zoning District. The applicant has divided the lease hold into two sections;

one of which houses 12 video viewing booths, each approximately 40 inches deep by 30 inches wide. Each booth is approximately eight feet high, is enclosed by a door and contains a seat. The booths house a TV monitor which is utilized to show video tapes obtained in the other section of the facility. The viewing is accomplished by the payment through a coin box for the use of the video screen.

The company also sells adult magazines, books, adult games, adult novelties and lotions and video recorders [4] and cameras.

Adult video tapes are offered for sale and rental on the premises. These video tapes can be "previewed" according to the witness in the viewing booth for as long a period of time as the patron is willing to pay for utilizing the coin box at a rate of 25 cents for a minute and a half of viewing. The customer can view any one of 12 selections by switching channels on the TV monitor. There is no requirement that the tape or tapes viewed be purchased.

As the witness agreed, customers may come in, view a number of tapes and leave the premises without purchasing any merchandise or renting any merchandise whatsoever.

Counsel for the applicant argued that the viewing of tapes was in conjunction with the sale of such tapes and was part and parcel of the retail operation which is allowed in a Business B District.

The Board has considered the sworn testimony of applicant's witness and [5] the arguments of its counsel. It has also considered the advice of Board Counsel, E. Robert Levy, and makes the following findings: In this regard, the Board is only considering

a request for an interpretation as to whether the subject use needs a D use variance and will not address at this time other issues raised by counsel for the applicant, including the sufficiency of parking at the subject site.

In reaching its decision, the Board has also considered the written exhibits provided by applicant which include a factual statement, a non-scaled floor plan, and a report provided by Stephen Sussna, Ph.D., arguing that the subject use falls within the allowed uses in the Business B Zone.

As indicated by counsel, a history of this application indicates that Mr. Mauro had, at one time, refused to issue a Certificate of Occupancy for the video booths. His reason was that the facility would have changed the prior use to one [6] which he considered an amusement use with inadequate parking under the Code. The Township's Zoning Ordinance incorporates a very comprehensive scheme for the regulation of uses within the Township, and while not a model of clarity, its various sections can usually give a clear picture of which uses are or are not allowed within the municipality. This is the case in the matter under consideration.

In this regard, while the sale, service and rental of tapes and equipment does meet the criteria under retail sales of service use, the Board finds that the addition of video booths renders the use violative of the Township's Zoning Ordinance.

The video booth "use" is, in fact, and the Board so finds, distinct from the store's sales, rental and service functions, and does not itself fall within any use category set forth in the Land Use Ordinance as a permmitted use.

In this regard, it should be noted [7] that any use not expressly

permitted by our Ordinance is prohibited pursuant to Section 613-I.

In defining the use in question — namely, the video booths — probably the most analogous use one might find is that found in amusement parks and centers which coin-operated movie picture machines or motion picture machines once propelled by hand cranks are found. These were always considered an amusement use quite distinct from the typical retail store use as contemplated by that term in our Ordinance.

In any event, perhaps more importantly, Union's own ordinance expressly and clearly distinguishes a movie-type of use from retail sales by the express allowance of motion picture theaters in the Business B and Business C Zones pursuant to Section 605 of the Ordinance.

Furthermore, Section 707 of the Ordinance in its reference to parking for theaters, which obviously includes motion picture theaters, catagorizes such theaters [8] with auditoriums, churches, arenas and similar uses. The interpretation of such a provision would clearly indicate that the uses contemplated deal with large auditorium-type uses where patrons sit together in public groupings to watch movies, performances, and to listen to sermons or services. Plainly, the video booths do not meet this type of criteria and are, in truth, the antithesis of those types of uses since they are small very private areas for individuals to observe videos in complete privacy.

This use, therefore, in my judgment is, at the very least, a form of motion picture use which is not permitted within the Township because its does not fall within the movie picture or motion picture use that is, in fact, permitted.

Appendix C

Frankly, there is nothing more distinguishable in the Board's contemplation than the fashion in which Union's Ordinance refers to motion picture theaters and the impact this has on the particular use, which [9] clearly is a motion picture use not meeting the specific definition of that category of use within the Ordinace.

It is peculiar and quite interesting that the applicant's own presentation and its exhibits very strongly substantiate some of the Board's findings. While the applicant's exhibits focused on the parking issue, not decided here, in discussing the issue regarding assembly halls and their definition, applicant says that "Such a use is not a public gathering of persons in a large room or building." The applicant goes on to argue that "Large facilities such as arenas and auditoriums generate considerable traffic; whereas, smaller facilities dealing with retail sales and service uses do not."

Applicant goes on to say in its exhibits that "Retail sales and service usage has been differentiated from meeting halls, stadiums, theaters, movie houses, trade exhibitions" and so on.

It is clear, therefore, that the Board's finding is that movie theaters and [10] movie uses allowed in the Township are necessarily auditorium-type uses and the applicant seems to agree that that is the case.

The applicant further notes on Page 7 of its exhibits that uses such as adult book stores, adult drive-in theaters, adult entertainment cabarets, adult motels and the like are generally treated distinctly in zoning ordinances around the United States.

Union's Ordinance is likewise precise in separating and segregating uses and does not specifically provide for a permitted

use in the form of an adult video use which would have allowed the use in question. Therefore, when Union's Ordinance refers to motion picture theaters, it is referring to the only type of use in this Township that permits a motion picture or video theater use or any video usage where patrons can come in and watch films on the premises.

Therefore, the Board finds that the [11] subject use in not, in fact, a retail use. If anything, it is an amusement use or a prohibited movie or movie theater use since it falls into a private movie category and does not meet the criteria or definition of "movie theater" within the Ordinance.

Therefore, in sum, the use involved is prohibited.

It should also be noted in this regard that the applicant has tried to relate its movie use and video use to its sale of tapes. This Board finds such efforts disingenuous and unreasonable given the fact presented by its own witness, even disregarding the testimony concerning the advertising in a newspaper which would indicate an attempt had been made in the past to enduce patrons into the premises to watch movies.

The key fact here is that patrons can watch movies on the subject premises without purchasing or renting a tape. They can watch as many of the videos as they wish to without purchasing or renting them [12] and there is no attempt whatsoever to relate the observation or watching of a movie of a video to its purchase or rental. There is no limitation in terms of the time which the patron can spend watching a video or videos and there is no control over that function. Therefore, patrons can come into the subject premises, watch videos, and stay there literally for hours without being disturbed. This is clearly a movie or amusement use and

it is certainly not a retail sales or service use. It is not an accessory use. It does not serve to assist the retail sale. It is independent thereof and not permitted as indicated.

The significant cost to watch these videos is another fact which mitigates against the applicant's arguments that the use is tied to the sale or rental of videos. If one were inducing patrons to watch a movie in order to decide whether to purchase the video, there would not be a charge as high as 25 cents for 90 seconds. Instead, it is clear that the applicant is being paid [13] a substantial sum of money to permit patrons to watch video tapes on premises. That is obviously what the booths were designed to do.

In this regard, the fact that 12 booths are available adds to the facts supporting the Board's conclusions. It is inconceivable to this Board that one would put 12 independent viewing booths with 12 TV monitors and all of the necessary equipment that goes with it if the only use of a booth was designed to assist in the retail sale or retail rental of a video.

Given the number of tapes testified to and sold or rented per week, and the number of days of operation, it is clear that 12 booths were not at all necessary to accommodate patrons who might want to make a brief observation of a particular video to see whether it should be purchased or rented.

In sum, the proposed use does not fall within the retail sales or services provisions of our Ordinance, nor does it fall [14] within any other provision of the Ordinance which would allow the use on premises.

For the reasons set forth, the Board has concluded on this 5th day of September, 1990, that the use of video booths on the

subject premises as described by the applicant's testimony and documentary evidence is not a permitted use in the Business B Zoning District. Therefore, a D variance would be necessary if the use is to be continued on the subject premises.

CHAIRMAN RUSSO: Mr. Winhold, do you want to move this resolution?

MR. WINHOLD: Mr. Chairman, I move that we concur with the findings and conclusions set forth in the resolution as read by counsel.

MR. PETTI: Second.

CHAIRMAN RUSSO: Roll call.

MR. MAURO: Mr. Winhold?

MR. WINHOLD: Yes.

MR. MAURO: Mr. Capriglione?

MR. CAPRIGLIONE: Yes.

[15] MR. MAURO: Mr. Petti?

MR. PETTI: Yes.

MR. MAURO: Mr. Kessler?

MR. KESSLER: Yes.

MR. MAURO: Mr. Lewis?

Appendix C

MR. LEWIS: Yes

MR. MAURO: Chairman Russo?

CHAIRMAN RUSSO: Yes.

The Resolution is approved.

(Whereupon, the Resolution of Interpretation was adjourned.)

(2)

No. 91-1102

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

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Petitioners,

vs.

TOWNSHIP OF UNION, a political subdivision of the State of New Jersey, and SALVATORE J. MAURO, Construction Official of the Township of Union, in his official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the unreviewed administrative interpretation of an ambiguous provision of a municipality's zoning ordinance by the municipality's Zoning Board of Adjustment is sufficient to "settle" an issue of state law for *Pullman* abstention purposes where the Zoning Board of Adjustment has been specifically delegated responsibility for giving authoritative interpretations of local zoning ordinances by the New Jersey Legislature. That is, whether in these circumstances, an administrative interpretation of a facially ambiguous ordinance will remove the ambiguity for *Pullman* purposes.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

January 25, 1985: Petitioners applied for a permit for proposed

alterations and received same from respondent, Mauro.

March 5, 1986: Construction completed and Mauro issued Certificate of Occupancy for pre-existing retail use.

November, 1986: Mauro issued summons after discovering that petitioners had added twelve viewing booths after issuance of the Certificate of Occupancy.

March 3, 1987: Summons dismissed in Municipal Court to allow petitioners to file action in the Superior Court of New Jersey, Law Division, Union County.

July 29, 1987: Petitioners filed complaint in the Law Division appealing Mauro's decision that there was an extension of a preexisting non-conforming use by the addition of the viewing booths. Petitioners also included a claim dealing with 42 U.S.C. § 1988.

August 17, 1988: Claim under 42 U.S.C. § 1988 dismissed with prejudice by parties' stipulation.

November 18, 1988: Oral argument before Honorable Edward W. Beglin, Jr., Assignment Judge for Union County who entered judgment in favor of respondents and against petitioners.

December 7, 1988: Petitioners filed notice of appeal to the Superior Court of New Jersey, Appellate Division, challenging the ruling made by Judge Beglin.

September 29, 1989: Oral argument before the Appellate Division of the Superior Court.

October 19, 1989: The Appellate Division affirmed the judgment entered in the court below.

February 1, 1990: Upon the appeal filed by petitioners which challenged the decision made by Mauro, the Union Township Construction Board of Appeals directed that petitioners were to file an application with the Union Township Zoning Board of Adjustment for a use variance, site plan approval and interpretation of the Land Development Ordinance.

June 4, 1990: Petitioners filed a request for interpretation of the Ordinance with the Union Township Zoning Board of Adjustment.

August 1, 1990: Public meeting held by the Zoning Board of Adjustment on petitioners' request for interpretation of the Land Development Ordinance.

September 5, 1990: The Zoning Board of Adjustment adopted a resolution by a 6-0 vote concluding that the use of the video booths was not a permitted use on these premises.

October 29, 1990: Petitioners filed an appeal from the September 5, 1990 resolution of the Zoning Board of Adjustment with the Superior Court of New Jersey, Law Division, Union County. That appeal is still pending and has not been heard nor has a decision been rendered.

September 17, 1990: [Note: to assure smooth flow of events the following dates are known to be out of strict chronological order]. Mauro issued an order to the Chief of Police to require that use of the video booths cease and desist. That order was served upon petitioners' employee and the portion of the building where the booths were located was sealed off. The balance of the premises where retail use was carried on was left untouched.

October 1, 1990: The U.S. District Court for the District of New Jersey issued an order to show cause returnable on October 11, 1990 to Mauro and the Township of Union as to why temporary restraints should not issue.

October 11, 1990: After oral argument and review of briefs filed by the parties, Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey denied petitioners' request for restraints and ordered hearing on their complaint set down for October 17, 1990.

October 17, 1990: Judge Debevoise rendered his opinion exercising his discretion in applying the *Pullman* doctrine. [Pa 19a].

October 24, 1990: Petitioners filed Notice of Appeal with the U.S. Court of Appeals for the Third Circuit.

April 3, 1991: Oral argument was heard by the Third Circuit court.

September 24, 1991: Decision was rendered by the Third Circuit court affirming the District Court opinion. [Pa 1a].

January 6, 1992: Petition for writ of certiorari served upon the respondents' attorney.

B. Statement of Facts.

This is a zoning case in which petitioners failed to exhaust administrative remedies pursuant to Rule 4:69-5 of the Rules Governing the Courts of the State of New Jersey.

On or about January 25, 1985, petitioners submitted an application for a building permit to defendant Salvatore J. Mauro, Construction Official of the Township of Union. At the same time, petitioners filed an Architect's plan made by John P. DePalma, Architect, dated January 25, 1985, indicating proposed "alterations to East Building, 1521 Route 22, Union, New Jersey." The application made by petitioners indicated that the proposed alterations were to divide open space into three offices or sales units with toilets. The specific use was represented by petitioners to be *retail sales*, a permitted use in this zoning district.

Upon completion of the construction, inspection was made and a Certificate of Occupancy was issued by defendant Salvatore J. Mauro, Union Township Construction Official, (hereafter "Mauro"), on or about March 5, 1986.

On or about August 25, 1986, Thomas H. Stauch, a prospective tenant, made an application to Mauro for a Certificate of Continued Occupancy to operate a clothing store on the vacant second floor of the premises. Mauro and various subcode officials conducted inspections of the premises. Certain recommendations were made by the subcode officials as a result of these inspections. These recommendations were made by the subcode officials so that the premises would comply with the Township Building Code. They included installation of toilets on the second floor, a roof to be installed over the exterior stairway from the second floor to the ground and a railing modification required by the fire subcode official.

Inspection by Mauro of the first floor area occupied by petitioners disclosed that booths and partitions were installed and constructed which were not originally indicated on the plans filed by petitioners with Mauro. Said booths were, in effect, small rooms with solid floor to ceiling doors.

On October 24, 1986 Mauro wrote to the owner of the property, Mr. William Untracht advising that petitioners had added a new use to the premises which required additional off-street parking. Petitioners received a copy of that letter also. Because of violations cited by Mauro pursuant to various Township of Union Ordinances attributed to petitioners, Mauro was required to deny Stauch the Certificate of Continued Occupancy and refunded the fee paid by Stauch. Petitioners ignored Mauro's requests that all violations of the Land Development Ordinance and Building Code cease. Because occupancy of the premises was a violation of the Township of

Union Land Development Ordinance and Building Code, Mauro caused a Summons to be issued in Municipal Court of Union against petitioner Jack B. Chesner on or about November 25, 1986.

On or about March 3, 1987, said Summons was dismissed by the Union Township Municipal Court with the consent of the respondents to allow petitioners to file action in Superior Court, Law Division of New Jersey, Union County.

On or about July 29, 1987 petitioners filed their complaint alleging a variety of claims including a constitutional claim for compensatory damages and attorney fees pursuant to 42 U.S.C. § 1988. Said claim was dismissed by petitioners, with prejudice, and a Stipulation of Dismissal was filed on August 17, 1988. What remained of the original complaint, therefore, was simply a zoning case.

Petitioners have added to, or converted the use of, the premises on the first floor after issuance of the Certificate of Occupancy without first obtaining approval and/or a permit to do so. Such action violated the Land Development Ordinance and Building Code of the Township of Union. Petitioners never made application to the Zoning Board of Adjustment of the Township, nor had they applied to the Planning Board of the Township for site plan approval despite the extending of the original use from retail to a place of entertainment.

Petitioners, by change of use and occupancy from the original application for retail use, failed to comply with the parking requirements of the Township of Union Land Development Ordinance and failed to exhaust any administrative remedy such as application for variance to the Township of Union Planning Board or to the Township of Union Board of Adjustment.

On October 27, 1988 respondents moved for dismissal of

petitioners' Complaint for failure to exhaust administrative remedies pursuant to R.4:69-5. On November 18, 1988 oral argument by telephone was held before the Honorable Edward Beglin, Jr., A.J.S.C. Counsel for both parties were given the opportunity to present oral arguments in addition to briefs previously filed, at which time the court upon examination and deliberation ruled in favor of respondents' motion dismissing petitioners' Complaint.

The court found that petitioners did in fact fail to exhaust administrative remedies. It determined that the proper and appropriate setting of this matter lay with a quasi-judicial body, *i.e.*, the local board of adjustment, whose own expertise and knowledge in the area is particularly equipped to address and grant the relief sought by the petitioners.

On December 7, 1988 petitioners filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division. Respondents moved for summary disposition to dismiss petitioners' appeal pursuant to R. 2:8-3(b), in that there was no genuine issue remaining as to any material fact, and respondents were entitled to their judgment as a matter of law. The Appellate Division decided that the ruling of the lower court was correct and affirmed.

On October 1, 1990, the United States District Court for the District of New Jersey issued an Order to Show Cause returnable on October 11, 1990. Briefs were filed and oral argument was held before Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey, and the matter was set down for hearing on petitioners' complaint for October 17, 1990. At that time, Judge Debevoise rendered his opinion. (PA 19a).

That decision was appealed by petitioners to the United States Court of Appeals for the Third Circuit. Oral argument was heard

on April 3, 1991 and the Court's opinion was filed September 24, 1991. (PA 1a). Petitioners seek review of the opinion rendered by the United States Court of Appeals for the Third Circuit.

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Court of Appeals for the Third Circuit. Oral argument was heard on April 3, 1991 and the Court's opinion was filed September 24, 1991. (PA 1a). Petitioners seek review of the opinion rendered by the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

The respondents respectfully submit that this is not a case which meets this Court's criteria for the granting of a petition for certiorari, and more importantly, the case was correctly decided by the several courts below as recited in the Statement of the Case, Paragraph A. Course of Proceedings and Disposition in the Courts Below.

The District Court finding that the Zoning Ordinance of the Township of Union was amenable to a construction by the state courts which would obviate the need for federal adjudication was sustained by the Third Circuit. In fact, petitioners have chosen such a route by filing an appeal of the Zoning Board's decision by an action in lieu of prerogative writ with the Superior Court of New Jersey, Law Division, Union County. In effect this action by petitioners will allow the state court to rule in the first instance upon proper interpretation of the Zoning Ordinance.

With reference to the doctrine set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 [1941], the special circumstances were determined to have been met by the District Court and the Third Circuit.

The fact remains is that the District Court has the power to make a *discretionary* determination as to whether to abstain or not. This case is somewhat fact sensitive. The Zoning Board of Adjustment found as a fact that the video booths were a separate and distinct use from the permitted retail use; the petitioners argue that the video booths were included within the

definition of a "retail shop". The District Court found that either of the positions held by the parties was plausible and therefore the language of the ordinance was ambiguous on its face.

The District Court and the Third Circuit found that the case at bar typically was the kind that triggered *Pullman* abstention. Those courts correctly found that an interpretation by the state court would obviate the need for or substantially narrow the scope of the constitutional issues. Therefore the second factor to be considered in applying the *Pullman* doctrine was found to have been met.

Land use issues are an area of particularly local concern involving state and local law. An erroneous federal court decision would be disruptive of important state policies as found by the District Court and Third Circuit, both of which concluded that the third *Pullman* prerequisite was met.

Finally, the Third Circuit found that the District Court did not abuse its discretion in abstaining pursuant to the *Pullman* doctrine.

This is not an appropriate case for the granting of the petition for certiorari and we respectfully pray that this Court deny the writ.

REASONS FOR DENYING THE WRIT

POINT I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE CRITERIA OR CONSIDERATIONS FOR THE GRANTING OF A WRIT OF CERTIORARI AS SET FORTH IN RULE 10.

This is a fact-bound case not appropriate for plenary review.

In addition, the facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari in this Court as set forth in Rule 10 of this Honorable Court. While respondents recognize that the considerations set forth in Rule 10 are neither controlling nor exhaustive, respondents respectfully submit that they are clearly indicative of the fact that this Court should not grant the petition for the writ of certiorari in this case.

As stated in Rule 10.1 of the Rules of the Supreme Court of the United States, "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor . . ." Petitioner here has certainly shown no "special and important reasons" for the granting of the writ in this case.

There has been no showing by petitioners that the decision of the United States Court of Appeals for the Third Circuit is in conflict with other United States Courts of Appeal on the same subject matter; nor has there been a showing that the Third Circuit Court's decision is in conflict with a decision by a state court of last resort; nor has there been a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners fail to cite an opinion of a state court of last resort which decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Petitioners have not presented this Court with an important question of federal law which has not, but should be, settled by this Court, or that the Third Circuit has decided a federal question in a way that conflicts with the decisions of this Court.

Indeed, the petitioners have presented a question of interpretation of a local zoning ordinance which is presently filed and pending in the Superior Court of New Jersey, Law Division, Union County, a court which is uniquely and better able to render a proper decision in such a local zoning case.

For the foregoing reasons, the respondents respectfully pray that this Court deny the petition; the case involves no questions of law which merit this Court's granting the petition for certiorari.

POINT II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURTS DO NOT CONFLICT WITH THE DECISIONS OF THE NEW JERSEY SUPREME COURT.

The Third Circuit court noted that the leading case of *Belleville v. Parrillo's, Inc.*, 83 N.J. 309 decided by the New Jersey Supreme Court stands for the proposition that a nonconforming use cannot be expanded to include other types of uses. The Supreme Court found to be dispositive the trial court's test which stated that "a disco is a place wherein you dance and a restaurant is a place wherein you eat. It is as simple as that." So we have here the same situation: a retail shop is where you purchase articles and a movie is where you sit to be entertained. It is as simple as that.

Further, the New Jersey Supreme Court let stand the decision of the Appellate Division of the Superior Court in *Cos-Lin, Inc. v. Spring Lake Board of Adjustment et als*, 221 N.J. Super. 148, *cert. denied*, 110 N.J. 201. The issue in this case was whether changing a seasonal restaurant and hotel in a residential zone to a year-round operation was an illegal extension of the prior

nonconforming use existing for some 30 years. The *Cos-Lin* court reviewed the history of prohibition of extending non-conforming uses in New Jersey. The court held that the temporal extension was an illegal extension of the prior non-conforming use.

There are collections of cases from other states which are cited in *Cos-Lin*, specifically referring to such leading texts as *Rathkopf, The Law of Zoning and Planning*, 51.07 (*see also* xx 51.02 and 51.04); 8A *McQuillan, Municipal Corporations; Anderson, American Law of Zoning; Powell, Real Property; Williams, American Land Planning Law.*

The spirit of the New Jersey case and statute law is that extension of a prior non-conforming use without permission is prohibited; and that spirit is fostered by the belief that such prohibition will eventually cause the non-conforming use to become abandoned or conforming.

There is no merit in the petitioners' argument that the decisions below are inconsistent with the decisions of this Court. There is no genuine constitutional issue for decision by this Court. The petitioners misstate the issue involved. This is not a constitutional question, it is a zoning case, and as such the courts below, both State and Federal, were correct in their holdings. The petitioners could have easily avoided this journey through the systems had they simply made an application for relief under the *Municipal Land Use Law of New Jersey, N.J.S.A. 40:55D-1 et seq.* to the Zoning Board of Adjustment. We are years later and still they have never taken the first and most elementary step.

CONCLUSION

This case meets none of the Court's criteria for the granting of the writ of certiorari. It is a zoning case best decided by the courts of the State of New Jersey. The petitioners have had their "day in court", in fact several days in several courts. For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

DAVID B. ZURAV
Attorney for Respondents

Supreme Court, U.S.
FILED
FEB 18 1992
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

January 25, 1985: Petitioners applied for a permit for proposed

alterations and received same from respondent, Mauro.

March 5, 1986: Construction completed and Mauro issued Certificate of Occupancy for pre-existing retail use.

November, 1986: Mauro issued summons after discovering that petitioners had added twelve viewing booths after issuance of the Certificate of Occupancy.

March 3, 1987: Summons dismissed in Municipal Court to allow petitioners to file action in the Superior Court of New Jersey, Law Division, Union County.

July 29, 1987: Petitioners filed complaint in the Law Division appealing Mauro's decision that there was an extension of a preexisting non-conforming use by the addition of the viewing booths. Petitioners also included a claim dealing with 42 U.S.C. § 1988.

August 17, 1988: Claim under 42 U.S.C. § 1988 dismissed with prejudice by parties' stipulation.

November 18, 1988: Oral argument before Honorable Edward W. Beglin, Jr., Assignment Judge for Union County who entered judgment in favor of respondents and against petitioners.

December 7, 1988: Petitioners filed notice of appeal to the Superior Court of New Jersey, Appellate Division, challenging the ruling made by Judge Beglin.

September 29, 1989: Oral argument before the Appellate Division of the Superior Court.

October 19, 1989: The Appellate Division affirmed the judgment entered in the court below.

February 1, 1990: Upon the appeal filed by petitioners which challenged the decision made by Mauro, the Union Township Construction Board of Appeals directed that petitioners were to file an application with the Union Township Zoning Board of Adjustment for a use variance, site plan approval and interpretation of the Land Development Ordinance.

June 4, 1990: Petitioners filed a request for interpretation of the Ordinance with the Union Township Zoning Board of Adjustment.

August 1, 1990: Public meeting held by the Zoning Board of Adjustment on petitioners' request for interpretation of the Land Development Ordinance.

September 5, 1990: The Zoning Board of Adjustment adopted a resolution by a 6-0 vote concluding that the use of the video booths was not a permitted use on these premises.

October 29, 1990: Petitioners filed an appeal from the September 5, 1990 resolution of the Zoning Board of Adjustment with the Superior Court of New Jersey, Law Division, Union County. That appeal is still pending and has not been heard nor has a decision been rendered.

September 17, 1990: [Note: to assure smooth flow of events the following dates are known to be out of strict chronological order]. Mauro issued an order to the Chief of Police to require that use of the video booths cease and desist. That order was served upon petitioners' employee and the portion of the building where the booths were located was sealed off. The balance of the premises where retail use was carried on was left untouched.

October 1, 1990: The U.S. District Court for the District of New Jersey issued an order to show cause returnable on October 11, 1990 to Mauro and the Township of Union as to why temporary restraints should not issue.

October 11, 1990: After oral argument and review of briefs filed by the parties, Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey denied petitioners' request for restraints and ordered hearing on their complaint set down for October 17, 1990.

October 17, 1990: Judge Debevoise rendered his opinion exercising his discretion in applying the *Pullman* doctrine. [Pa 19a].

October 24, 1990: Petitioners filed Notice of Appeal with the U.S. Court of Appeals for the Third Circuit.

April 3, 1991: Oral argument was heard by the Third Circuit court.

September 24, 1991: Decision was rendered by the Third Circuit court affirming the District Court opinion. [Pa 1a].

January 6, 1992: Petition for writ of certiorari served upon the respondents' attorney.

B. Statement of Facts.

This is a zoning case in which petitioners failed to exhaust administrative remedies pursuant to Rule 4:69-5 of the Rules Governing the Courts of the State of New Jersey.

On or about January 25, 1985, petitioners submitted an application for a building permit to defendant Salvatore J. Mauro, Construction Official of the Township of Union. At the same time, petitioners filed an Architect's plan made by John P. DePalma, Architect, dated January 25, 1985, indicating proposed "alterations to East Building, 1521 Route 22, Union, New Jersey." The application made by petitioners indicated that the proposed alterations were to divide open space into three offices or sales units with toilets. The specific use was represented by petitioners to be *retail sales*, a permitted use in this zoning district.

Upon completion of the construction, inspection was made and a Certificate of Occupancy was issued by defendant Salvatore J. Mauro, Union Township Construction Official, (hereafter "Mauro"), on or about March 5, 1986.

On or about August 25, 1986, Thomas H. Stauch, a prospective tenant, made an application to Mauro for a Certificate of Continued Occupancy to operate a clothing store on the vacant second floor of the premises. Mauro and various subcode officials conducted inspections of the premises. Certain recommendations were made by the subcode officials as a result of these inspections. These recommendations were made by the subcode officials so that the premises would comply with the Township Building Code. They included installation of toilets on the second floor, a roof to be installed over the exterior stairway from the second floor to the ground and a railing modification required by the fire subcode official.

Inspection by Mauro of the first floor area occupied by petitioners disclosed that booths and partitions were installed and constructed which were not originally indicated on the plans filed by petitioners with Mauro. Said booths were, in effect, small rooms with solid floor to ceiling doors.

On October 24, 1986 Mauro wrote to the owner of the property, Mr. William Untracht advising that petitioners had added a new use to the premises which required additional off-street parking. Petitioners received a copy of that letter also. Because of violations cited by Mauro pursuant to various Township of Union Ordinances attributed to petitioners, Mauro was required to deny Stauch the Certificate of Continued Occupancy and refunded the fee paid by Stauch. Petitioners ignored Mauro's requests that all violations of the Land Development Ordinance and Building Code cease. Because occupancy of the premises was a violation of the Township of

Union Land Development Ordinance and Building Code, Mauro caused a Summons to be issued in Municipal Court of Union against petitioner Jack B. Chesner on or about November 25, 1986.

On or about March 3, 1987, said Summons was dismissed by the Union Township Municipal Court with the consent of the respondents to allow petitioners to file action in Superior Court, Law Division of New Jersey, Union County.

On or about July 29, 1987 petitioners filed their complaint alleging a variety of claims including a constitutional claim for compensatory damages and attorney fees pursuant to 42 U.S.C. § 1988. Said claim was dismissed by petitioners, with prejudice, and a Stipulation of Dismissal was filed on August 17, 1988. What remained of the original complaint, therefore, was simply a zoning case.

Petitioners have added to, or converted the use of, the premises on the first floor after issuance of the Certificate of Occupancy without first obtaining approval and/or a permit to do so. Such action violated the Land Development Ordinance and Building Code of the Township of Union. Petitioners never made application to the Zoning Board of Adjustment of the Township, nor had they applied to the Planning Board of the Township for site plan approval despite the extending of the original use from retail to a place of entertainment.

Petitioners, by change of use and occupancy from the original application for retail use, failed to comply with the parking requirements of the Township of Union Land Development Ordinance and failed to exhaust any administrative remedy such as application for variance to the Township of Union Planning Board or to the Township of Union Board of Adjustment.

On October 27, 1988 respondents moved for dismissal of

petitioners' Complaint for failure to exhaust administrative remedies pursuant to R.4:69-5. On November 18, 1988 oral argument by telephone was held before the Honorable Edward Beglin, Jr., A.J.S.C. Counsel for both parties were given the opportunity to present oral arguments in addition to briefs previously filed, at which time the court upon examination and deliberation ruled in favor of respondents' motion dismissing petitioners' Complaint.

The court found that petitioners did in fact fail to exhaust administrative remedies. It determined that the proper and appropriate setting of this matter lay with a quasi-judicial body, *i.e.*, the local board of adjustment, whose own expertise and knowledge in the area is particularly equipped to address and grant the relief sought by the petitioners.

On December 7, 1988 petitioners filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division. Respondents moved for summary disposition to dismiss petitioners' appeal pursuant to R. 2:8-3(b), in that there was no genuine issue remaining as to any material fact, and respondents were entitled to their judgment as a matter of law. The Appellate Division decided that the ruling of the lower court was correct and affirmed.

On October 1, 1990, the United States District Court for the District of New Jersey issued an Order to Show Cause returnable on October 11, 1990. Briefs were filed and oral argument was held before Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey, and the matter was set down for hearing on petitioners' complaint for October 17, 1990. At that time, Judge Debevoise rendered his opinion. (PA 19a).

That decision was appealed by petitioners to the United States Court of Appeals for the Third Circuit. Oral argument was heard

on April 3, 1991 and the Court's opinion was filed September 24, 1991. (PA 1a). Petitioners seek review of the opinion rendered by the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

The respondents respectfully submit that this is not a case which meets this Court's criteria for the granting of a petition for certiorari, and more importantly, the case was correctly decided by the several courts below as recited in the Statement of the Case, Paragraph A. Course of Proceedings and Disposition in the Courts Below.

The District Court finding that the Zoning Ordinance of the Township of Union was amenable to a construction by the state courts which would obviate the need for federal adjudication was sustained by the Third Circuit. In fact, petitioners have chosen such a route by filing an appeal of the Zoning Board's decision by an action in lieu of prerogative writ with the Superior Court of New Jersey, Law Division, Union County. In effect this action by petitioners will allow the state court to rule in the first instance upon proper interpretation of the Zoning Ordinance.

With reference to the doctrine set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 [1941], the special circumstances were determined to have been met by the District Court and the Third Circuit.

The fact remains is that the District Court has the power to make a *discretionary* determination as to whether to abstain or not. This case is somewhat fact sensitive. The Zoning Board of Adjustment found as a fact that the video booths were a separate and distinct use from the permitted retail use; the petitioners argue that the video booths were included within the

definition of a "retail shop". The District Court found that either of the positions held by the parties was plausible and therefore the language of the ordinance was ambiguous on its face.

The District Court and the Third Circuit found that the case at bar typically was the kind that triggered *Pullman* abstention. Those courts correctly found that an interpretation by the state court would obviate the need for or substantially narrow the scope of the constitutional issues. Therefore the second factor to be considered in applying the *Pullman* doctrine was found to have been met.

Land use issues are an area of particularly local concern involving state and local law. An erroneous federal court decision would be disruptive of important state policies as found by the District Court and Third Circuit, both of which concluded that the third *Pullman* prerequisite was met.

Finally, the Third Circuit found that the District Court did not abuse its discretion in abstaining pursuant to the *Pullman* doctrine.

This is not an appropriate case for the granting of the petition for certiorari and we respectfully pray that this Court deny the writ.

REASONS FOR DENYING THE WRIT

POINT I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE CRITERIA OR CONSIDERATIONS FOR THE GRANTING OF A WRIT OF CERTIORARI AS SET FORTH IN RULE 10.

This is a fact-bound case not appropriate for plenary review.

In addition, the facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari in this Court as set forth in Rule 10 of this Honorable Court. While respondents recognize that the considerations set forth in Rule 10 are neither controlling nor exhaustive, respondents respectfully submit that they are clearly indicative of the fact that this Court should not grant the petition for the writ of certiorari in this case.

As stated in Rule 10.1 of the Rules of the Supreme Court of the United States, "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor . . ." Petitioner here has certainly shown no "special and important reasons" for the granting of the writ in this case.

There has been no showing by petitioners that the decision of the United States Court of Appeals for the Third Circuit is in conflict with other United States Courts of Appeal on the same subject matter; nor has there been a showing that the Third Circuit Court's decision is in conflict with a decision by a state court of last resort; nor has there been a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners fail to cite an opinion of a state court of last resort which decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Petitioners have not presented this Court with an important question of federal law which has not, but should be, settled by this Court, or that the Third Circuit has decided a federal question in a way that conflicts with the decisions of this Court.

Indeed, the petitioners have presented a question of interpretation of a local zoning ordinance which is presently filed and pending in the Superior Court of New Jersey, Law Division, Union County, a court which is uniquely and better able to render a proper decision in such a local zoning case.

For the foregoing reasons, the respondents respectfully pray that this Court deny the petition; the case involves no questions of law which merit this Court's granting the petition for certiorari.

POINT II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURTS DO NOT CONFLICT WITH THE DECISIONS OF THE NEW JERSEY SUPREME COURT.

The Third Circuit court noted that the leading case of *Belleville v. Parrillo's, Inc.*, 83 N.J. 309 decided by the New Jersey Supreme Court stands for the proposition that a nonconforming use cannot be expanded to include other types of uses. The Supreme Court found to be dispositive the trial court's test which stated that "a disco is a place wherein you dance and a restaurant is a place wherein you eat. It is as simple as that." So we have here the same situation: a retail shop is where you purchase articles and a movie is where you sit to be entertained. It is as simple as that.

Further, the New Jersey Supreme Court let stand the decision of the Appellate Division of the Superior Court in *Cos-Lin, Inc. v. Spring Lake Board of Adjustment et als*, 221 N.J. Super. 148, *cert. denied*, 110 N.J. 201. The issue in this case was whether changing a seasonal restaurant and hotel in a residential zone to a year-round operation was an illegal extension of the prior

nonconforming use existing for some 30 years. The *Cos-Lin* court reviewed the history of prohibition of extending non-conforming uses in New Jersey. The court held that the temporal extension was an illegal extension of the prior non-conforming use.

There are collections of cases from other states which are cited in *Cos-Lin*, specifically referring to such leading texts as *Rathkopf, The Law of Zoning and Planning,* 51.07 (*see also* xx 51.02 and 51.04); 8A *McQuillan, Municipal Corporations; Anderson, American Law of Zoning; Powell, Real Property; Williams, American Land Planning Law.*

The spirit of the New Jersey case and statute law is that extension of a prior non-conforming use without permission is prohibited; and that spirit is fostered by the belief that such prohibition will eventually cause the non-conforming use to become abandoned or conforming.

There is no merit in the petitioners' argument that the decisions below are inconsistent with the decisions of this Court. There is no genuine constitutional issue for decision by this Court. The petitioners misstate the issue involved. This is not a constitutional question, it is a zoning case, and as such the courts below, both State and Federal, were correct in their holdings. The petitioners could have easily avoided this journey through the systems had they simply made an application for relief under the *Municipal Land Use Law of New Jersey, N.J.S.A. 40:55D-1 et seq.* to the Zoning Board of Adjustment. We are years later and still they have never taken the first and most elementary step.

CONCLUSION

This case meets none of the Court's criteria for the granting of the writ of certiorari. It is a zoning case best decided by the courts of the State of New Jersey. The petitioners have had their "day in court", in fact several days in several courts. For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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